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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 139.

DAVID R. JULIAN, SHERIFF; MRS. CLEMYE JAMES, ADMINISTRATRIX OF W. A. JAMES, AND MRS. FANNIE E. HOWARD, ADMINISTRATRIX OF JOHN H. A. HOWARD, PETITIONERS,

vs.

THE CENTRAL TRUST COMPANY AND THE SOUTHERN RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITION FOR CERTIORARI FILED OCTOBER 11, 1906.
CERTIORARI AND RETURN FILED APRIL 22, 1907.

(18,685.)

12230

(18,685.)

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TRANSCRIPT OF RECORD.

At a United States circuit court of appeals for the fourth circuit begun at Richmond, Virginia, on the first Tuesday in May, being the 6th day of the same month, in the year of our Lord one thousand nine hundred and two, and adjourned by direction of the senior circuit judge to meet at Charleston, S. C., on Thursday, May 8, 1902, where the May term was held—present: Hon. Charles H. Simonton, circuit judge, Hon. William H. Brawley, district judge, Hon. Edmund Waddill, Jr., district judge—among other were the following proceedings:

D. R. JULIAN, Sheriff; CLEMYE JAMES, Administratrix, ET AL., Appellants,
versus
SOUTHERN RAILWAY COMPANY and CENTRAL TRUST COMPANY OF New York, Appellees.

Appeal from the circuit court of the United States for the western district of North Carolina, at Statesville.

Be it remembered that heretofore, to wit: the 13th day of January 1902, in pursuance of an order of the circuit court of the United States for the western district of North Carolina made and entered on the 19th day of December 1901, together with an agreement of the solicitors of both parties, the transcript of record in this case was waived, and the original papers of the said circuit court were
2 transmitted by the said circuit court to this court for the purpose of this appeal, which are as follows, to wit:

Prosecution Bond.

Filed Oct. 5, 1901.

UNITED STATES OF AMERICA,
Western District of North Carolina.

Circuit Court, 4th Circuit.

CENTRAL TRUST COMPANY OF NEW YORK and Southern Railway Company, Complainants,
against
DAVID R. JULIAN, Sheriff of Rowan County. } Prosecution Bond.

Know all men by these presents, that we Central Trust Company of New York, and Southern Railway Company, principals and A. B. Andrews, as surety are held and firmly bound unto the defendant in the above-entitled action in the sum of two hundred dollars, to the payment of which we bind ourselves firmly by these presents.

Sealed with our seals, and dated the 5th day of October, 1901.

The condition of the above obligation is such, that whereas the said Central Trust Company of New York, and Southern Railway Company, plaintiffs in the above-entitled cause have this day filed a bill in equity against the defendant therein. Now, if the said plaintiffs shall prosecute said suit with effect, or in case they fail therein, shall well and truly pay to the said defendant all such cost and damages as shall be awarded and recovered against the said plaintiffs then the above undertaking to be void, otherwise
3 to remain in full force and effect.

CENTRAL TRUST COMPANY OF NEW YORK AND
SOUTHERN RAILWAY COMPANY,
By CHAS. PRICE, *Att'y.*
A. B. ANDREWS. [SEAL.]

Taken and acknowledged before me this 5th day of October, 1901.
[NOTARIAL SEAL.] W. T. SMITH,
Notary Public.

UNITED STATES OF AMERICA, }
Western District of North Carolina, } *ss:*

A. B. Andrews being by me duly sworn, says that he is worth the sum of five hundred dollars in real estate over and above all his debts and liabilities, and property exempt from execution.

A. B. ANDREWS.

Subscribed and sworn to before me this 5th day of October A. D. 1901.
[NOTARIAL SEAL.] W. T. SMITH,
Notary Public, Wake Co. N. C.

Chancery Subpœna.

Filed Oct. 5, 1901.

UNITED STATES OF AMERICA, }
Western District of North Carolina, } *ss:*

The United States of America to David R. Julian, sheriff of Rowan county:

We command you, and every one of you, that you appear before the judges of our circuit court of the United States of America, for the western district of North Carolina, at the office of the clerk of the said court, in the town of Statesville, in said district, on the 3rd Monday in the month of October, next, to answer the bill of
4 complaint of the Central Trust Company of New York, and the Southern Railway Company filed in the clerk's office, in said town of Statesville, then and there to receive and abide by such judgment and decree as shall then, or thereafter, be made, upon pain of judgment being pronounced against you by default.

To the marshal of the western district of North Carolina to execute.

Seal of the Circuit Court.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Statesville, in said district, the 5 day of October, 1901, and in the one hundred and 26th year of the Independence of the United States.

H. C. COWLES, *Clerk.*

Memorandum.

The within-named defendants are notified, that, unless they enter their appearance in the clerk's office of said circuit court, at Statesville aforesaid, on or before the day to which the within writ is returnable, the complaint will be taken against them as confessed, and a decree entered accordingly.

H. C. COWLES, *Clerk.*

Endorsed: "Received October the 5th, 1901. Executed by reading and delivering a copy hereof, to the respondent David R. Julian at Salisbury, N. C., October the 5" 1901. J. M. Millekan, U. S. marshal. J. T. Millekan, deputy marshal. Fees $7.70."

5 *Injunction.*

Filed Oct. 5, 1901.

UNITED STATES OF AMERICA, }
Western District of North Carolina. }

United States Circuit Court, Fourth Circuit.

STATESVILLE, *October* 5, *A. D.* 1901.

The President of the United States to the marshal of said district, Greeting:

You are hereby commanded to make known to David R. Julian, sheriff of Rowan county, the defendant, in the bill, that he is enjoined from proceeding any further, with the sale of the property mentioned in the bill, until the further order of this court: and you are commanded to deliver to him, the said Julian, copies of the bill, and order of injunction, and also to serve the subpœna, herewith sent.

Herein, fail not, and make due return of this writ.

Seal of the Circuit Court.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Statesville, N. C., the 5th day of October, 1901, and in the 126th year of the Independence of the United States.

H. C. COWLES,
Clerk U. S. Circuit Court, Western District of North Carolina.

(Endorsed:) "Received October the 5th 1901. Executed by reading and delivering a copy hereof to the respondent David R. Julian at Salisbury, N. C. October 5th 1901, together with a certified copy of the bill in equity. J. M. Millekan, U. S. marshal, J. T. Millekan deputy marshal."

6 *Answer of D. R. Julian, Sheriff.*

Filed Oct. 21, 1901.

In the Circuit Court of the United States, Western District of North Carolina.

THE CENTRAL TRUST COMPANY OF NEW YORK and The Southern Railway Company
vs.
D. R. JULIAN and Others.
} In Equity.

D. R. Julian, sheriff of Rowan county, State of North Carolina, now and at all times hereafter saving and reserving unto himself all manner of benefit of exception which can or may be had or taken to the many errors, uncertainties and imperfections in said bill of complaint, for answer unto said bill or unto so much thereof as this defendant is advised it is material or necessary for him to make answer unto, answering, says:

(1.) This defendant admits the allegations contained in the first paragraph of the complaint to be true, as he is informed and believes; but refers to the records therein referred to in confirmation of this answer and in order to be accurate.

(2.) The defendant admits the sale of the property of the Western North Carolina Railroad Company, the purchase by the Southern Railway Company, and the execution of a deed by the master purporting to convey the property of the Western North Carolina Railroad Company, including its franchises; but he denies, upon information and belief, that the said deed had the legal effect to convey to the Southern Railway Company the property and franchises of the said Western North Carolina Railroad Company, so as to release the Western North Carolina Railroad Company and its property and franchises from liability to pay the judgment debts upon which the executions hereinafter referred to were issued.

(3.) That the allegations of the complainant set out in the third paragraph of the complaint of the Central Trust Company are untrue as therein alleged, as this defendant is informed and believes.

(4.) That the defendant has no knowledge or information, sufficient to form a belief, whether the allegations in the fourth paragraph of the complaint are true or not.

Answering so much of the said supplemental bill as is in the joi complaint of the Southern Railway Company and the Central Tru Company of New York, this defendant, says:

(1.) The defendant D. R. Julian admits that the Southern Railway Company is a corporation organized under the laws of the State of Virginia and doing business in the State of North Carolina, as alleged in the first paragraph of the said supplemental complaint; and he admits, further, that the advertisement of sale of the corporate property of the Western North Carolina railroad, including its franchises, is correctly set forth in the second paragraph thereof.

(2.) The defendant admits that the levies were made in pursuance of executions issued by the clerk of the superior court of
7 Rowan county, upon the judgments referred to and mentioned in the third paragraph of the said complaint, and avers also that the same was done by a demand and under the direction of the plaintiffs in execution.

(3.) In answer to the allegations contained in the third paragraph of the complaint, the defendant admits that W. A. James, the intestate of Mrs. Clemye James, administratrix, and John H. A. Howard, intestate of Mrs. Fannie E. E. Howard, administratrix, were in the employment of the Southern Railway Compauy as engineer and brakeman, and, while so employed, were killed as therein alleged; but defendant denies that the Western North Carolina Railroad Company had no interest or estate in the Western North Carolina railroad, since the 24th day of Aug., 1894. On the contrary, this defendant avers, on information and belief, that the property of the Western North Carolina Railroad Company, including its franchises, is liable for the judgments of the said Clemye James, administratrix, and the said Fannie E. Howard, administratrix, on which the executions hereinbefore mentioned were issued.

(4.) The defendant admits that the executions, and the levies in pursuance thereof, are correctly set forth in the fourth paragraph of the complaint.

(5.) The defendant admits that he made the levies and advertised the property of the Western North Carolina Railroad Company to be sold, as alleged in the fifth paragraph of the complaint; but he denies that his actions in the premises were illegal and without authority of law. This defendant avers that, as he is informed, advised and believes, it was his duty to obey the mandate of superior court of Rowan county by making the said levies and advertising the said property.

(6.) That, in obedience to a writ of injunction issued in this suit and served upon him, this defendant refused to sell the property levied upon and advertised by him to be sold on the 7th day of October, 1901. But defendant denies that said levies were illegal or that he has done complainants irreparable injury, or any injury whatever by said levies.

(7.) This defendant is advised and believes that said writ of injunction was improvidently issued for the reason that this court has no jurisdiction and authority to enjoin an execution issuing on a judgment of the State court, and for the further reason that the matters and things set forth in said bill as grounds for the relief therein sought have been fully settled and adjudicated in the pending suit by this court in obedience to the mandate

of the circuit court of appeals, which decree is dated the 23rd day of April, 1900, which said decree and adjudication this defendant pleads in bar of the relief herein sought by the complainants.

Wherefore this defendant prays that he be dismissed with his costs unjustly incurred in this behalf, and for such other and further relief as — the court shall seem just and proper.

KERR CRAIGE,
Att'y for the Defendant, D. R. Julian.

D. R. Julian, the defendant above named, maketh oath that the facts set forth in the foregoing answer as of his own knowledge are true, and those stated on information and belief, he believes to be true.

D. R. JULIAN,
Sheriff Rowan Co.

Sworn to and subscribed before me this the 19 day of October, 1901.

[Seal of Court.]

W. G. WATSON,
Clerk Superior Court, Rowan County.

9 *Motion to be Allowed to Enter Special Appearance.*

Filed Oct. 25, 1901.

In the Circuit Court of the United States, Western District of North Carolina, Statesville, North Carolina.

IN THE MATTER OF THE SUIT OF THE CENTRAL TRUST COMPANY of New York, Complainant,
vs.
THE WESTERN NORTH CAROLINA RAILROAD COMPANY and Others, Respondents.

Now comes Clemye James, administratrix of W. A. James, and Fannie E. Howard, administratrix of John A. H. Howard, and specially appear under protest for the purpose of this plea, and for no other, and not confessing or acknowledging all or any of the matters and things in the bill of complaint mentioned and contained to be true, in such manner and form as the same are therein set forth and alleged, and say that the court had no authority on the first day of October, A. D., 1901, to grant the order restraining the sheriff of Rowan county, which appears of record, nor to grant an injunction after serving upon said sheriff complaint, subpœna and order to show cause, without notice to the said Clemye James, administratrix, as aforesaid, and the said Fannie E. Howard, administratrix, as aforesaid, it appearing from the bill of complaint and exhibits that the said D. R. Julian, sheriff of Rowan county, was acting in a ministerial capacity, discharging a duty as the agent in

contemplation of law of the said James, administratrix, and said Howard, administratrix, under their direction and control, and that the said James, administratrix, and the said Howard, administratrix, were the parties in interest and entitled to notice before the court can proceed to hear the cause and determine whether they shall be perpetually restrained from selling the franchises and property of the Western North Carolina Railroad Company in pursuance of the judgments which, as is alleged in the bill of complaint, they have recovered against the Western North Carolina Railroad Company.

Wherefore, insisting that the court had no power or authority to issue its order to the sheriff of Rowan county directly restraining him, and making him a party — this suit, or to grant such temporary restraining order without an order requiring subpœna to be issued to and copies of the bill and orders to show cause why they should not be perpetually enjoined, they say that the bill of complainants should be dismissed.

CLEMYE JAMES,
Administratrix of W. A. James.
FANNIE E. HOWARD,
Administratrix of John H. A. Howard.

STATE OF NORTH CAROLINA, }
County of Rowan. }

Fannie E. Howard makes solemn oath and says that she is the administratrix of John A. H. Howard, and is the plaintiff who recovered one of the judgments whereon execution issued and was placed in the hands of Rowan county, which execution was levied upon the franchises and property of the Western North Carolina Railroad Company, and that the foregoing plea is not made for delay, and that the same is true in point of fact.

FANNIE E. HOWARD.

Sworn to and subscribed before me this the — day of October, A. D., 1901.

[NOTARY SEAL.]

W. F. SNIDER,
Notary Public.

I hereby certify that, in *my* opinion, the foregoing plea is well founded in point of law.

LEE S. OVERMAN,
A. C. AVERY,
B. F. LONG,
Of Counsel for Clemye James, Administratrix of W. A. James, and Fannie E. Howard, Administratrix of John H. A. Howard.

11 *Special Appearance.*

Filed Oct. 25, 1901.

In the Circuit Court of the United States, Western District of North Carolina, Statesville, North Carolina.

IN THE MATTER OF THE SUIT OF THE CENTRAL TRUST COMPANY of New York, Complainants,
vs.
THE WESTERN NORTH CAROLINA RAILROAD COMPANY and Others, Respondents.

Now comes the defendants, Clemye James, administratrix of W. A. James, and Fannie E. Howard, administratrix of John H. A. Howard, by their attorneys, Lee S. Overman, B. F. Long and A. C. Avery, and enter their appearance for the purpose of pleading to the jurisdiction and for other purposes.

Oct. 24th, 1901.

A. C. AVERY,
B. F. LONG,
LEE S. OVERMAN,
Attorneys for Defendants.

General Appearance for D. R. Julian.

Filed Oct. 25, 1901.

In the Circuit Court of the United States, Western District of North Carolina, Statesville, North Carolina.

IN THE MATTER OF THE SUIT OF THE CENTRAL TRUST COMPANY OF New York, Complainant,
vs.
THE WESTERN NORTH CAROLINA RAILROAD COMPANY and Others, Respondents.

Now comes Lee S. Overman, B. F. Long and A. C. Avery and enter a general appearance for the defendant D. R. Julian only.

Dated Oct. 24th, 1901.

A. C. AVERY,
B. F. LONG,
LEE S. OVERMAN,
Attorneys for Defendant D. R. Julian.

12 *Motions to Dismiss Bill and Denial of Same.*

Filed Feb. 1, 1902.

Circuit Court of the United States, Western District of North Carolina, Fourth Circuit. In Equity.

D. R. JULIAN, Sheriff of Rowan, and Others, Appellants,
vs.
THE CENTRAL TRUST COMPANY and THE SOUTHERN RAILway Company, Appellees. } No. 38.

At the hearing before the undersigned at the October term of the circuit court at Statesville, N. C., D. R. Julian, sheriff, moved to dismiss the bill for that he was not a party in interest, but was a mere agent of the plaintiffs in execution, Mrs. James and Mrs. Howard. This motion was denied and the attorneys of Julian excepted and assigned the same as error.

Clemye James, administratrix of W. A. James, and Fannie E. Howard, administratrix of John H. A. Howard, entered a special appearance for the purpose of moving to dismiss the bill for the reasons set out in their special plea. Their motion was denied by the court, and to the judgment of the court denying the said motion the appellants excepted and assigned the same for error.

It is ordered that the above assignments of error by appellants are approved and made a part of the record in the above-entitled cause, and the clerk will send up this with the other portions of the original record to the circuit court of appeals, agreeably to the order heretofore made in the cause for the purpose of sending up the original record.

JAS. E. BOYD,
District Judge of the United States for the Western District of North Carolina.

I am certain that Judge Boyd signed this paper.
CHAS. PRICE.
Jan. 30th, 1902.

13 *Answer of Respondents.*

Filed October 25, 1901.

In the Circuit Court of the United States, Western District of North Carolina, Statesville, North Carolina.

IN THE MATTER OF THE SUIT OF THE CENTRAL TRUST COMPANY of New York, Complainant,
vs.
THE WESTERN NORTH CAROLINA RAILROAD COMPANY and Others, Respondents.

The joint and several answers of Clemye James administratrix of W. A. James, and Fannie E. Howard, administratrix of John H. A.

Howard, to the supplemental bill of complaint filed on the first day of October, A. D., 1901, and improperly and erroneously entitled as a supplemental bill in said cause, respectfully showeth in answer to the said supplemental bill, which, after appearing specially through their counsel and moving to dismiss for want of jurisdiction of the subject-matter of the bill of complaint and of the persons of these respondents, these respondents still appearing under protest and averring that, as they are advised, informed and believe, the said bill does not state a cause of complaint of which the court can take cognizance, say, in response to the allegation contained in the said supplemental bill:

1. That, in answer to section one (1) of the said bill of complaint, they admit that Exhibit A is the transcript of the record of a cause heard on appeal in the United States circuit court of appeals, fourth circuit, at Richmond, and deny all recitations of the contents of said record inconsistent with the said record itself, whether the said recitations are contained in the first or second section of the said supplemental bill of complaint or in any subsequent sections thereof, and they deny all conclusions of law purporting to be drawn from what appears in said record, whether contained in said first section or any subsequent section of said supplemental bill of complaint.

2. That they deny the truth of the allegations contained in the section (2) section of the bill of complaint as therein stated, and especially the allegation therein contained that the Southern Rail-
14 way Company, a corporation created and organized in the State of Virginia, became the purchaser, as alleged therein, of the franchise or property of the Western North Carolina railroad, or by virtue of any deed made in pursuance of any decree therein referred to, acquired any right or title to the franchise or property of the Western North Carolina Railroad Company, which these respondents are precluded or estopped from denying by any action or proceeding in the courts of the State of North Carolina, which they may be advised, or may have been advised, to prosecute against the Western North Carolina Railroad Company in the courts of said State in order to subject the said franchise and said property of said company to the payment of two judgments in favor of these respondents, respectively, and against the said The Western North Carolina Railroad Company, by virtue of which judgments and executions issued thereon these respondents had caused the sheriff of Rowan county to advertise the said franchise and property for sale on the 7th day of October, A. D., 1901, as alleged in said supplemental bill of complaint.

3. That these respondents deny the truth of the allegations contained in the third (3) section of the supplemental bill of complaint, and while they admit that the Southern Railway Company took a deed from the master purporting to convey the said franchises and property subject to the lien of the first-mortgage bonds theretofore issued by the said company, they aver that the Southern Railway Company, being at the time of said sale not a resident corporation of the State of North Carolina, and not subject to visitation of said State, but attempting to do business therein by comity, was not

allowed or authorized by the laws of North Carolina to purchase, or hold, or operate the Western North Carolina railroad, or to own its franchise and property without becoming a domestic corporation, and that, by virtue of certain laws enacted by the legislature of North Carolina at its session of 1879, being chapter 10 of the Laws of 1879, re-enacted in the Code of North Carolina as section 1255, no mortgage of the Western North Carolina Railroad Company, thereafter issued, had the legal effect of exempting the property or earnings of said company from execution for the satisfaction of any judgment obtained in the courts of said State against said company for torts thereafter committed by said company, its agents or employees, whereby any person should be killed, or any person or property injured, "any clause or clauses in such mortgage to the contrary notwithstanding," both the first-mo*a*-gage bonds subject
15 to which the sale of the franchise and property of said company purporting, under the decree referred to in the bill of complaint, to have been sold, and the second-mortgage bonds, for default in payment of the interest on which the decree of foreclosure was entered, appear from said record (Exhibit A to said bill of complaint) to have been issued long after the enactment of said statute in the year 1871, and the said statute, since its enactment in 1871, has been the law of the State of North Carolina, in contemplation of which all railroad companies created by and organized under the laws of said State have issued all mortgage bonds, the said statute, as these respondents are advised, informed and believe, having entered into and formed a part of every mortgage bond issued by any railroad corporation operating under the laws of North Carolina since its enactment in 1871.

4. That these respondents deny the truth of the allegations contained in the fourth (4) section of the said supplemental bill of complaint, except that the said Southern Railway Company has been in possession of, and has been operating, the Western North Carolina railroad since the 24th day of August, 1894, and these respondents are advised, informed and believe, and therefore aver, that the Southern Railway Company has not acquired title to the franchise and property of the Western North Carolina Railroad Company, subject only to the lien of the first-mortgage bonds of said company, issued in the year 1884; but that whatever right, title or interest, if any, in the franchise and property of the Western North Carolina Railroad Company was acquired by said Southern Railway Company is subject also to the lien of the judgments in favor of these respondents described in the execution, levies and advertisements referred to and set forth as exhibits to the said bill of complaint.

5. That these respondents cannot be deprived of the benefit of a lien upon the franchise and property of the Western North Carolina Railroad Company, which is superior to, and has a priority over, the said lien of the said mortgage bonds of said company, as they are advised, informed and believe, by virtue of any treaty of the said Southern Railway Company, or the Central Trust Company of New York, when the said lien has been acquired in pursuance of the provisions of the statute of the State of North Carolina, which entered

into and formed *and* a part of the contract of the said The Western North Carolina Railroad Company to pay the first and second mortgage bonds of said company mentioned in the complaint, and
16 described in said Exhibit A and of the provisions of which the Central Trust Company of New York had notice, when it took the said first and second mortgage bonds, and of which the Southern Railway Company, when it became the highest bidder at the foreclosure sale, as alleged in the bill of complaint, also had notice.

Further answering subsection one (1) section five (*1*) of the complaint, purporting to be the complaint of the said Southern Railway Company in conjunction with the Central Trust Company of New York, these respondents, on information and belief, deny that the Southern Railway Company was doing business in the State of North Carolina at or before the foreclosure suit, as alleged therein, and these respondents are advised, informed and believe that the court had no jurisdiction and no authority to issue a restraining order to prohibit David R. Julian, high sheriff of the county of Rowan, who was acting as the agent and in contemplation of law, under the direction of these respondents, from selling the franchise and property of the Western North Carolina Railroad Company, advertised by said sheriff to be sold on the 7th of October, as alleged in said bill of complaint.

Further answering, these respondents say, and specially plead, that the complainant, the said Southern Railway Company and the Central Trust Company of New York are estopped and concluded by a decree heretofore entered in this court and in this cause, the said Southern Railway Company, the said Central Trust Company of New York and these respondents being parties to the supplemental proceeding wherein said decree of this court was entered, and that by virtue of said decree the said Southern Railway Company and the said Central Trust Company of New York, being parties before the court in the cause wherein it was made as aforesaid, are concluded from denying the right of these respondents from proceeding by execution under their respective judgments set forth in the bill of complaint and exhibits to subject the franchise and property of the Western North Carolina Railroad Company to the liens of their respective judgments by a sale, in pursuance of the execution, levy and advertisements attached as exhibits to the bill of complaint, and these respondents specially plead that upon the coming down of the mandate of the circuit court of appeals of the fourth circuit, which mandate was sent down in accordance with the opinion rendered on the appeal, the record of which is attached to the bill of complaint as Exhibit A, a decree was entered in this court, declaring that these respond-
ents were not bound by the decree of sale in said foreclosure
17 suit and were not prohibited from proceeding as they might be advised to collect their said judgments in the courts of the State of North Carolina, a copy of the said decree being hereto attached marked Exhibit B, and these respondents further specially plead, that subsequent to the rendition of the said decree, a copy of

which is attached to this answer, marked Exhibit B, the complainant herein filed a petition for mandamus against the judge of this court, entitled as of said appeal, praying the court to issue a writ of mandamus to the judge of this court, commanding him to alter the said decree so as to declare these respondents to have been concluded by the said decree of sale for foreclosure, and to prohibit these respondents from proceeding under the laws of North Carolina to collect their said judgment; and, that, upon answer to said petition and argument of counsel, the said circuit court of appeals for the fourth circuit rendered its opinion, refusing to grant said writ of mandamus and declaring that the said decree, a copy of which is attached hereto as Exhibit B, was rendered in accordance with the mandates and opinion of said appellate court.

Further answering subsection 2, these respondents deny that the court has jurisdiction to prevent these respondents from proceeding to collect their judgments rendered in the State court by selling under a lien which has priority over that of the first or second mortgage bonds issued by the said Western North Carolina Railroad Company, even though in the enjoyment of rights lawfully acquired a purchaser at execution sale should rightfully disturb the possession of the Southern Railway Company of the franchise and property of the Western North Carolina Railroad Company.

Further answering the said bill of complaint, these respondents admit that they caused executions to be issued upon their respective judgments and levies to be made under and sales to be advertised by virtue of said execution.

Further answering the supplemental bill of complaint of the Southern Railway Company, complaining with the Central Trust Company of New York, these respondents say that they deny all allegations contained in said bill, and purporting to give a history of the two actions in the State of North Carolina, wherein these respondents recovered judgment against the Western North Carolina Railroad Company, except in so far as the said allegations correctly recite the facts appearing from the record filed as an exhibit. But these respondents deny the truth of the allegation "that, at
18 the time of their death (referring to the death of W. A. James and John H. A. Howard), the Western North Carolina Railroad Company had no interest in the Western North Carolina railroad, or the franchises, nor had it any interest or estate in said railroad or franchise of any kind or nature whatsoever since the 22nd day of August, 1894, the day the Southern Railway Company took possession of said railroad;" and these respondents aver that the supreme court of North Carolina, the highest appellate court of said State, held and adjudged, in the year A. D. 1898, in actions pending therein on appeal, and in which these respondents, respectively, were plaintiffs, and the said The Western North Carolina Railroad Company was defendant, that the said Western North Carolina Railroad Company was still an existing corporation, liable to be sued in the courts of said State, and that the said judgments in favor of these respondents, respectively, and against the Western North Carolina Railroad Company, constituted liens upon the franchise and property

of the said company, superior to the liens of the said first-mortgage bonds or the said second-mortgage bonds mentioned in the said foreclosure suit, and these respondents are advised, informed and believe, that the courts of the United States are bound to follow and adopt the construction given by the highest appellate court of North Carolina in construing its own constitution and its own laws. And these respondents are advised, informed and believe that, though the Southern Railroad Company had assumed the right to operate the Western North Carolina railroad, and had employed the intestates of these respondents as engineer and fireman, when they were killed by the negligence of said Southern Railway Company, that the supreme court of North Carolina had held and adjudged, in the said actions brought by these respondents against the Western North Carolina Railroad Company, and wherein they recovered the judgments in pursuance of which executions have issued, as alleged in the bill of complaint, that the said The Western North Carolina Railroad Company was answerable for the torts of the Southern Railway Company, and for any damage to its employees caused by the negligence of said Southern Railway Company in operating said railroad. And they further aver that in the case of Howard *vs.* The Western North Carolina Railroad, there was no appeal from the judgment of the supreme court of Rowan county.

Further answering the said bill of complaint, these respondents admit that executions have been issued upon the said judgments in favor of these respondents, and that levies have been made
19 under the same, and these respondents believe that the copies of said executions and levies which are attached as exhibits to the bill of complaint are substantially correct; but these respondents reserve the right to make any corrections necessary to make them correspond with the originals.

5th. That these respondents deny the truth of the allegations contained in subsection 5 of the bill of complaint, that D. R. Julian, sheriff, levied on or advertised the franchise and property of the Western North Carolina Railroad Company contrary to law, and aver that the said D. R. Julian, in levying said execution, and making said advertisement, discharged a duty imposed upon him by the laws of the State of North Carolina requiring him so to do, and that the supreme court of the State of North Carolina had, before said levy was made, decided that the said judgments in favor of these respondents constituted liens upon its franchise and property superior to the lien of any mortgage bonds issued by said company before the recovery of said judgment.

6th. That these respondents have no knowledge or information sufficient to form a belief as to the truth of the allegation that the complainant, The Southern Railway Company, ever requested D. R. Julian, sheriff, to desist from doing his duty by proceeding to sell under said execution, but they deny that the said Julian did anything that it was not his duty as an officer under the laws of North Carolina to do, and these respondents deny the authority and jurisdiction of this court to restrain and enjoin the sheriff of Rowan county from making sale in pursuance of an execution regularly

issued from a superior court of North Carolina, and aver that, as they are advised, informed and believe, the courts of the United States are expressly prohibited from enjoining said sheriff from selling under said execution by section 720 of the Revised Code of the United States.

7th. That these respondents had no knowledge nor information as to whether the said D. R. Julian, sheriff, would place any one who might purchase the said franchise and property at a sale under execution in possession, but aver that under the statutes in force in North Carolina it would be his duty so to do.

These respondents are advised, informed and believe that the allegations of the bill, if true, would not be sufficient to entitle the complainant to relief in a court of equity, in order either to prevent irreparable damage or a multiplicity of suits.

20 These respondents are advised that a court of equity is not authorized to use its extraordinary powers to prevent and prohibit these respondents from satisfying judgments that are the penalty of negligence, lest the refusal of complainants to pay their just demands and the consequent resort to legal process for the satisfaction of said judgments should affect the market price of bonds purporting to be secured by the franchise and property of the Western North Carolina Railroad Company.

Wherefore these respondents pray:

That the bill of complaint be dismissed: 1. For want of jurisdiction in the circuit court of the United States of the subject-matter of the bill of complaint.

Second. For want of jurisdiction in the circuit court of the United States to grant an order restraining or enjoining the sheriff of Rowan county from selling the property levied upon in obedience to the executions in his hands.

Third. Because the question whether the court is empowered to issue a restraining order or an order of injunction forbidding said sheriff to sell, in obedience to the executions issued upon the judgments in favor of these respondents, respectively, is *res judicata*, by by virtue of orders heretofore made in this cause and the judgments and decisions of the circuit court of appeals of the United States, fourth circuit, at Richmond, made and rendered therein.

2. That these respondents be hence dismissed and that they recover cost.

LEE S. OVERMAN.
A. C. AVERY.
B. F. LONG.

UNITED STATES OF AMERICA, }
Western District of North Carolina. }

Fannie E. Howard, administratrix of John H. A. Howard, one of the respondents, maketh oath that the facts stated and matters alleged in the foregoing answer are true, except as to those matters stated on information and belief, and as to them she believes it to be true.

FANNIE E. HOWARD,
Adm'tr'x of J. H. A. Howard.

Sworn to and subscribed before me this the 11 day of October, A. D., 1901, in witness whereof I have hereunto set my hand and attached my official seal.

[NOTARY SEAL.] W. F. SNIDER,
Notary Public.

21 *Replication.*

Filed Oct. 25, 1901.

United States Circuit Court, Western District of North Carolina.

IN THE MATTER OF THE SUIT OF THE CENTRAL TRUST Company of New York *against* THE WESTERN NORTH CAROLINA RAILROAD Company and Others. } In Equity.

Replication.

The complainants, making replication to the answer of respondent, now comes and say:

1. That they reiterate and reaffirm the allegations contained in their supplemental bill.

2. That the allegations contained in the answer of the respondent, herein filed, are not true, wherein the allegations of said bill are denied, and are not true, wherein facts are set out, not contained in the bill, and alleged as a defence to the same.

3. That, denying the truth of the said matters, and things, set out in the said answer, of the respondent, and reaffirming the allegations in the said bill, the complainants ask to make good, their said allegations, by proofs, to be taken, as this honorable court may direct.

CHAS. PRICE, *Solicitor.*

22 Charles Price, being sworn according to law, says: That he is the solicitor of complainants, and that the foregoing replication to the answer of respondent, is true.

CHAS. PRICE.

Sworn to, and subscribed, before me this 25th day of October, 1901.

H. C. COWLES, *Clerk.*

COMPLAINANT'S EXHIBITS.

Filed October 25, 1902.

NORTH CAROLINA, *Burke County.*

GILES
vs.
W. N. C. RAILROAD.

Be it remembered, that on the 20th day of September A. D., 1901, the plaintiff B. A. Giles, administrator of P. S. Giles, deceased, against The Western North Carolina Railroad Company, The Southern Railway Company and W. S. Taylor, sued out and had issued from the superior court of Burke county, N. C., a summons in the following words, to wit:

NORTH CAROLINA:

In the Superior Court, Burke County.

B. A. GILES, Administrator of P. S. Giles, *against* THE WESTERN NORTH CAROLINA RAILROAD Co., The Southern Railway Company, & W. S. Taylor. } Summons for Relief.

State of North Carolina to the sheriff of Burke county, Greeting:

23 You are hereby commanded, to summon The Western North Carolina Railroad Company, The Southern Railway Company and W. S. Taylor, the defendants above named, if they be found within your county, to be and appear before the judge of our superior court, at a court to be held for the county of Burke at the court-house in Morganton, on the 1st Monday in October 1901, same being the 7th day of October A. D. 1901, and answer the complaint which will be deposited in the office of the clerk of the superior court of said county within the first three days of the term, and let the said defendants take notice that if they fail to answer the complaint within the time required by law, the plaintiff will apply to the court for the relief demanded in the complaint.

Herein fail not, and of this summons make due return.

Given under my hand and seal of said court, this 20th day of September A. D. 1901.

P. W. PATTON,
Clerk Superior Court, Burke County.

On back of summons was the following:

We acknowledge ourselves bo-nd unto The Western North Carolina Railroad Company, The Southern Railway Company and W. S. Taylor, the defendants in this action, in the sum of two hundred

dollars, to be void, however, if the plaintiff B. A. Giles, administrator of P. S. Giles shall pay to the defendants all such costs as the defendants may recover of the plaintiff in this action.

Witness our hands and seals, this 20th day of September
24 A. D. 1901.

B. A. GILES, [SEAL.]
Adm'r of P. S. Giles.
J. H. GILES. [SEAL.]

Received September 20th, 1901, served September 21st 1901 by reading the within summons to W. S. Taylor and delivering a copy of same to G. P. Erwin, treasurer & secretary of Western North Carolina Railroad Company, J. W. Wilson Jr., agent Southern Railway Company:

MANLEY McDOWELL,
Sheriff of Burke Co.

Whereupon the following complaint was filed :—

NORTH CAROLINA, }
Burke County. }

Superior Court, October Term, 1901.

B. A. GILES, Administrator of P. S. Giles,
vs.
THE WESTERN NORTH CAROLINA RAILROAD COMPANY, The Southern Railway Company, and W. S. Taylor. } Complaint.

Plaintiff complains and alleges:

1st. That the defendant, The Western North Carolina Railroad Company is a domestic corporation, organized and acting under a charter granted by the General Assembly of North Carolina, and until about the year 1894 was operating under its said charter, known as the Western North Carolina Railroad Company extending from the town of Salisbury through Burke county to the line of the State of Tennessee near Hot Springs, which line of railway it was operating as a carrier of freight and passengers between the
25 terminal points aforesaid, until the date aforesaid when, without warrant of law, it surrendered or attempted to surrender its charter, rights, franchises and railroad and equipments to the defendant, The Southern Railway Company, a corporation organized under the laws of the State of Virginia, the said Southern Railway Company then being a foreign corporation, without power to acquire the charter and franchises of said defendant, The Western North Carolina Railroad, as plaintiff is informed and believes, and plaintiff is informed, advised and believe- that said defendant The Western North Carolina Railroad Company, thereafter continued to be and was on the 30th day of July A. D. 1901, liable for the torts of said Southern Railway Company, its agents and employees, which it unlawfully suffered to operate its said line of railroad.

2nd. That the defendant, The Southern Railway Company is a corporation organized under the laws of the State of Virginia, and that prior to the first day of June 1899, said corporation voluntarily became, and was made, and is now and was on the 30th day of July 1901, a domestic corporation of the State of North Carolina, by compliance with chapter 62 of the Public Laws of North Carolina, session of 1899, and thereby became invested with all the rights and privileges and became subject to all the liabilities of corporations of the State of North Carolina, the same as if said corporation has been originally created by the laws of this State, as plaintiff is informed, advised and believes.

3rd. That the defendant, The Southern Railway Company,
26 is now and was on the 30th day of July 1901 engaged in the business of transporting freight and passengers over the said railway known as the Western North Carolina railroad, between the town of Salisbury and the Tennessee line in said State near Hot Springs, which railroad it unlawfully acquired possession of and attempted to acquire title to by collusion with the defendant The Western North Carolina Railroad Company as aforesaid.

4th. That the defendant, W. S. Taylor, is a locomotive engineer now and on the 30th day of July in the employ of the defendant, The Southern Railway Company, and on the 30th day of July 1901 was in charge of the engine on the west-bound passenger train of the defendant, The Southern Railway Company on the said railroad known as, The Western North Carolina railroad, which train ran over and killed the intestate of the plaintiff as hereinafter alleged, as plaintiff is informed, advised and believes, and that it was the duty of the said defendant W. S. Taylor to keep or cause to be kept by the other employees of said defendant, The Southern Railway Company under his immediate command and control a diligent and constant lookout on the track, and to use all the appliances and equipment at his or their command, or which should have been at his or their command, to avert an injury to persons on the track of said railroad.

5th. That on the 30th day of July 1901, after nightfall, the intestate of plaintiff, while wearied from a trip on a crowded excursion train to and from the city of Asheville, and when par-
27 tially intoxicated, as plaintiff is informed and believes, sat down on the end of a cross-tie on the said railroad, known as the Western North Carolina railroad, in Burke county, and soon thereafter fell asleep and became and was prone upon the track of said railroad, with his head lying on the rail in a helpless condition occasioned by his exhaustion and partial intoxication, as plaintiff is informed and believes and while said intestate so lay prone and helpless with his head on the rail as aforesaid, and while said intestate was in such a position that his helpless condition and peril could *have* easily have been observed by the said defendant W. S. Taylor and by the other employees of the defendant, The Southern Railway Company, under his immediate command and control by keeping a proper lookout in time by the use of the equipment and appliances at his and their command, or which should have been at

-heir command, to have observed the peril of plaintiff's intestate and to have stopped the train and averted the injury, said intestate was, carelessly and negligently run over and killed by a train of the defendant, The Southern Railway Company, in charge of the defendant W. S. Taylor as engineer, by reason of the failure of the defendant engineer to keep or have kept a proper lookout in order to avert injury to persons upon the track.

6th. That the proximate cause of the killing of plaintiff's intestate was the gross carelessness and negligence of the defendant, The Southern Railway Company, and of its agent and employees, the defendant W. S. Taylor in failing in their duty to keep a
28 diligent lookout on the track of said railroad and to observe the helpless position and condition of said intestate so lying prone on the railway of said railroad with his head on the rail and in a helpless condition as aforesaid, and that if such diligent lookout had been kept by said defendant and by its employee W. S. Taylor or by any other employee of said defendant, The Southern Railway Company as was their duty to do, the position and condition of said intestate lying asleep and in an insensible and helpless condition with his head on the tracks as aforesaid, could easily have been observed and the train stopped in time to avert the killing of plaintiff's intestate as aforesaid, with the equipment and appliances which were or which should have been at their command, as plaintiff is informed, advised and believes.

7th. That plaintiff B. A. Giles is and was prior to the issuance of the summons in this action the duly appointed and qualified administrator of his said intestate P. S. Giles.

8th. That by reason of the killing of his said intestate by the gross negligence and carelessness of the defendant, The Southern Railway Company and by the gross negligence and carelessness of the defendant W. S. Taylor, for which gross negligence and carelessness the defendant The Western North Carolina Railroad Company is also liable, as plaintiff is advised and believes, plaintiff has suffered great damage, to wit: in the sum of $20,000.

Wherefore plaintiff demands judgment, against the defendant for $20,000 damages, for costs of action to be taxed by the
29 clerk and for such other and further relief as to the court may seem just.

AVERY & AVERY,
AVERY & ERVIN,
Att'ys for Plaintiff.

NORTH CAROLINA, }
Burke County. }

B. A. Giles, the plaintiff in the above-entitled action being duly sworn says, that the foregoing complaint is true to the knowledge of affiant, except as to those matters therein stated on information and belief, and as to those matters he believes is to be true.

B. A. GILES.

Subscribed and sworn to, before me, this 9th day of October, A. D., 1901.

P. W. PATTON,
Clerk Superior Court.

NORTH CAROLINA, }
Burke County. }

I, P. W. Patton, clerk of the superior court of Burke county, *to* hereby certify that the foregoing is a full and perfect copy of the summons and complaint on file in my office in the case of B. A. Giles, administrator of P. S. Giles against the Western North Carolina Railroad Company, the Southern Railway Company and W. S. Taylor.

In testimony whereof, I have hereunto set my hand and official seal at office in the town of Morganton, North Carolina, this
30 15th day of October, A. D. 1901.

[Seal of Court.]

P. W. PATTON,
Clerk Superior Court, Buncombe County, N. C.

31 COMPLAINANT'S EXHIBIT.

Filed Oct. 25, 1901.

PERRY
vs.
W. N. C. RAILROAD CO. } From Burke.

Be it remembered, that on the second day of March A. D. 1897 the plaintiff, J. A. Perry, administrator of Pink Perry, deceased, against the Western North Carolina Railroad Company, sued out and had issued from the superior court of Burke county, N. C., a summons in the following words, to wit:

Summons for Relief.

NORTH CAROLINA, }
Burke County. }

In the Superior Court.

J. A. PERRY, Administrator of Pink Perry, Deceased,
against
THE WESTERN NORTH CAROLINA RAILROAD COMPANY.

State of North Carolina to the sheriff of Burke county, Greeting:

Your are hereby commanded to summons The Western North Carolina Railroad Company, the defendant above named, if it be found within your county, to be and appear before the judge of the superior court, at a court to be held for the county of Burke at the court-house in Morganton, on the second Monday after the first

Monday in March and answer the complaint, which will be deposited in the office of the clerk of the superior court of said county within the first three days of the term and let the said defendant take notice that if it fails to answer the said complaint within the time required by law, the plaintiff will apply to the court for the relief demanded in the complaint.

Hereof fail not, and of this summons make the due return.

Given under my hand and seal of said court, this 2nd day of March, 1897.

P. W. PATTON,
Clerk Superior Court.

32 On back of summons was as follows:

We acknowledge ourselves under bond unto The Western North Carolina Railroad Company, the defendant, in the sum of $200.00, to be void, however if the plaintiff, J. A. Perry, administrator, etc., shall pay to the defendant all such costs as the defendant may recover of the plaintiff in this action.

Witness our hands and seals, this 27th day of February, A. D., 1897.

J. A. PERRY, [SEAL.]
Administrator.
J. A. LACKEY. [SEAL.]

Received March 4th, 1897 served March 4th, 1897 by reading and delivering a copy of the summons to G. P. Erwin, treasurer of the Western North Carolina Railroad Company.

THOMAS M. WEBB, *Sheriff.*
By R. J. HALLYBURTON, *D. S.*

Whereupon the following complaint was filed:

NORTH CAROLINA, }
Burke County. }

Superior Court, Spring Term, 1897.

J. A. PERRY, Administrator of Pink Perry, Deceased, }
against } Complaint.
THE WESTERN NORTH CAROLINA RAILROAD COMPANY. }

The plaintiff complains and alleges:

1. That the defendant is a corporation created and organized under the laws of the State of North Carolina; and that under the power granted in its charter it constructed a railway from the town of Salisbury, in the county of Rowan, to Paint Rock on the line of the State of Tennessee, and operated said road or a portion of it, as a carrier of freight and passengers from the time of its construction until it leased its franchise and property as hereinafter more fully set forth.

2. That about the year 1882 the said Western North Carolina
33 Railroad Company leased and demised its franchise, road-bed and property to the Richmond and Danville Railroad Company, a corporation created and organized under the laws of the State of Virginia, and empowered to lease and operate other railroads, for the term of ninety-nine years, which last-named company continued to operate said railroad until about the — day of —— 1895, when it ceased to be a corporation, and the Southern Railway Company, another corporation, created and organized under the laws of Virginia, succeeded to its rights, powers and privileges, and became the purchaser of the unexpired term of said lease for ninety-nine years, and has since said — day of —— 1895, continuously operated said railroad as a carrier of freight and passengers from said town of Salisbury to Paint Rock.

3. That while the said Southern Railway Company was operating the said Western North Carolina railroad as its lessee, on the 16th day of September, 1896, it negligently injured the plaintiff's intestate on said line of railway by running its cars over his leg, so that such injury resulted in said intestate's death on the same day.

4. The plaintiff's intestate was injured so in attempting to cross over the said track of the defendant at the place where persons usually crossed over said side track in passing from the passenger depot, in the town of Morganton, Burke county, N. C., to the freight depot, which is situated on the opposite side of the said track, while a gravel train was standing upon said *track* side track, the rear of which was about thirty feet from said place of crossing.

5. That about the time plaintiff's intestate was in the act of crossing over said side track at said place the said gravel train, as plaintiff is informed and believes, was suddenly started back towards said crossing, and about the time that said gravel train was started to move back towards said crossing, without giving any sig-
34 nal by blowing or whistling, as it was the custom of engineers to do under similar circumstances at said place, and as said intestate had reasonable ground to believe said engineer would do, intestate's foot was caught by two splinters, which the defendant's lessee had carelessly permitted to protrude into the space, of about four inches intervening between the track and the platform, extending thence to the foot of the steps by which intestate was attempting to pass to the freight depot, and it became impossible for intestate to extricate himself from the trap thus carelessly formed by leaving said splinters between the railroad and the said platform until he was stricken by the said car and thrown down in such a position that the car passed over one of his legs and so injured him that he died during the same day, as aforesaid.

6. That the death of plaintiff's intestate, as plaintiff is informed and believes, was due as the proximate cause to the carelessness of the defendant's lessee in backing its trains as aforesaid, without giving the usual signals to indicate the purpose of the engineer to move and thereby warn intestate, so that he might have remained in safety between the main tracks and the side tracks, and to the

further negligence of the defendant's said lessee in allowing said splinters from the iron rail on its side track to so protrude in the direction of the platform at the usual place of crossing from the said passenger depot to the said freight depot as to catch his foot and render it impossible for him to extricate it during a period of time sufficient for a person to have passed across the entire side track in safety before the said gravel train was backed to the point where it crushed intestate's leg.

7. That the defendant's lessee, the Southern Railway Company, had allowed the plank of which the said platform was constructed, to protrude beyond the sill on which said plank rested several inches, so as to extend as aforesaid within three or four inches of the top of the rail, constituting a part of said side track, and had negligently failed to fill the intervening space with any solid substance, in consequence of which carelessness there was at the time said injury was inflicted upon plaintiff's intestate, reasonable ground to expect that any person passing from the said passenger to the said freight depot, over the route usually taken by the servants and patrons of the defendant's said lessee, would be subjected to the danger of having his foot slip into said aperture between said plank and said rail, so as to make it difficult, if not impossible, to extricate it from other parts of said aperture than that at which said splinter protruded, and that as the plaintiff is advised, informed and believes that said carelessness of the said aperture, was the proximate cause of the injury to the said intestate, resulting in his death, as aforesaid.

8. That before this action was brought the plaintiff was duly appointed and qualified as the administrator of the said Pink Perry.

9. That the plaintiff's said intestate, Pink Perry, was when he was fatally injured, seventeen years of age, was in perfect health, had the promise of a long life, and was steady, industrious and intelligent, and therefore plaintiff claims damage for the negligent killing of his said intestate in the sum of ten thousand ($10,000) dollars.

10. That at the time when the plaintiff's intestate was injured, as aforesaid, in attempting to cross the side track by the usual route to the steps of the freight depot in the said town of Morganton, Burke county, N. C., it was as the plaintiff is informed and believes, known by the engineer in charge of the engine attached to said gravel train and other servants of the defendant's lessee, the said Southern Railway Company, that a crowd was assembling around about the said freight and passenger depot to await the arrivel of a train from the rear of which it was expected that a speech would be delivered by one W. J. Bryan, a candidate for President of the United States of America, and the said servants and the said employees of the said railway company had reasonable grounds for the exercise of unusual care by giving signals before moving its train either on the main track or side track, in the vicinity of said station at Morganton, wherefore plaintiff demands judgement for

the sum of ten thousand dollars ($10,000) as damages, and the costs of action.

A. C. AVERY,
I. T. AVERY,
M. SILVER,
Att'ys for Plaintiff.

NORTH CAROLINA, }
Burke County. }

J. A. Perry, the plaintiff above named, being first duly sworn, deposes and says that the facts set forth in the foregoing complaint of his own knowledge are true, and those stated on information and belief he believes to be true.

J. A. PERRY.

Sworn to and subscribed before me, this the 16th day of March A. D., 1897.

P. W. PATTON,
Clerk Superior Court.

Whereupon, on the 26th day of April A. D., 1897, the following answer was filed in words as follows:

NORTH CAROLINA, }
Burke County. }

Superior Court, Spring Term, 1897.

J. A. PERRY, Administrator of Pink Perry, Deceased, }
against } Answer.
THE WESTERN NORTH CAROLINA RAILROAD COMPANY. }

The defendant, answering the complaint in this cause, says:

1. That the allegations contained in the first paragraph of
37 said complaint are true.

2. That so much of the second paragraph as alleges that the Southern Railway Company became the purchaser of the unexpired term of the lease for ninety-nine years is not true, if by the same it is meant that the Southern Railway Company owns no further interest in said railroad beyond said unexpired term of lease.

3. That, as defendant is informed and believes, the allegations contained in the third paragraph are not true, and they are denied.

4. That, as defendant is informed and believes, the allegations contained in the fourth paragraph are not true, and are denied.

5. That, as defendant is informed and believes, the allegations contained in the fifth paragraph are not true, and are denied.

6. That, as defendant is informed and believes, the allegations contained in the sixth paragraph are not true, and are denied.

7. That, as defendant is informed and believes, the allegations contained in the seventh paragraph are not true, and are denied.

8. That defendant has no knowledge nor information as to

whether the allegations contained in the eighth paragraph are true or not, and therefore denies the same.

9. That, as defendant is informed and believes, that allegations contained in the ninth paragraph are not true, and are denied.

10. That, as defendant is informed and believes, the allegations contained in the tenth paragraph are not true, and are denied.

And for a further answer to said complaint, defendant alleges:

1. That the injury to plaintiff's intestate was caused by the negligence, carelessness and recklessness of said intestate himself in attempting to cross defendant's track immediately in front of a moving train, which he saw and knew or could, by reason-
38 able diligence, have seen or known to be moving.

2. That at the time said intestate received the injury complained of which resulted in his death, he was a tresspasser upon defendant's railroad track and saw and knew or could by reasonable diligence have seen or known that the train was moving and the proximate cause of his injury was his own reckless attempt to cross the track before said moving train. That plaintiff's intestate contributed to his injury by his own negligence in attempting to cross defendant's track immediately before a train which he saw and knew or could by reasonable diligence have seen or known was moving.

And for a further answer and defense to this action defendant alleges:

1. That on the 2nd day of September, 1884, the said The Western North Carolina Railroad Company, being indebted to the Central Trust Company of New York in a large amount, to wit in the sum of four millions of dollars, executed and delivered to the said Central Trust Company of New York a mortgage deed, whereby it conveyed all the railroad and other property of whatsoever description then owned by the said The Western North Carolina Railroad Company, including all its franchises, rights, privileges, easements, income, earnings and profits, in trust, to secure said indebtedness and the interest thereon, as is fully set out in the said mortgage deed, which is hereto attached and made a part of this answer.

2. That said mortgage deed was duly registered in the office of the register of deeds for the county of Rowan, on the 1st day of October, 1884, and as defendant is informed and believes, was also registered in the office of the register of deeds of Burke county about the same date.

3. That afterwards, to wit, some time in the month of April 1894, the said, The Western North Carolina Railroad Company having first made default in the payment of its said indebtedness to the said Central Trust Company of New York, and the interest thereon, said Central Trust Company of New York brought its suit in
39 the circuit court of the United States for the western district of North Carolina at Statesville, N. C., for the foreclosure of said mortgage, and in said suit a decree was rendered by said court ordering all the property conveyed by the said mortgage to be sold at public outcry to the highest bidder at the passenger station of the Western North Carolina Railroad Company at Statesville, N. C.,

on a day and at an hour to be fixed by the special master in said decree appointed, and that afterwards the said special master did, on Tuesday, the 21st day of August, 1894, offer said property so conveyed by said mortgage and so decreed to be sold, to the highest bidder; when and where the said Southern Railway Company became the purchaser of said property as the last and highest bidder therefor.

4. That said special master duly report- said sale to said court and afterwards, on the 22nd day of August, 1894, said report and said sale were duly confirmed by a decree of said circuit court of the U. S., for the western district of N. C., and special master was, in said decree, ordered and directed to make a deed, conveying all of the property in said mortgage to the said Southern Railway Company in fee-simple.

5. That afterwards, to wit, on the — day of —— 1894, said special master, acting under and in obedience to said decree, made, executed and delivered to said Southern Railway Company, a deed whereby he conveyed to it all of said property mentioned and described in the said mortgage, which deed was duly registered in the office of the register of deeds of Burke county.

6. That since the execution of said deed by said special master the said Southern Railway Company has been in possession of all the property mentioned in said mortgage deed and has been holding and operating the same as the sole and absolute owner thereof.

7. That since said sale and the execution of said deed by said special master, the said Western North Carolina Railroad Co. has had nothing whatever to do with the operation of any of the property mentioned in said mortgage deed, and is not liable for any of the acts done or torts committed by said Southern Railway Company.

Wherefore, having fully answered, defendant demands that it be hence dismissed with its costs.

CHARLES PRICE,
S. J. ERVIN,
G. F. BASON,
Counsel for Defendant.
A. B. ANDREWS.

NORTH CAROLINA, }
Wake County. }

A. B. Andrews, being duly sworn, says that he is an officer of the defendant corporation, to wit, the president of the defendant corporation, to wit, the president thereof; that he has read the foregoing answer, and that the facts set forth therein as of his own knowledge are true, and those stated on information and belief he believes to be true.

Sworn to and subscribed before me, this 21st day of April 1897.
H. W. MILLER.

Whereupon the following reply was filed on the 30th day of April, 1897, in the following words, to wit;

NORTH CAROLINA, *Burke County.*

Superior Court.

J. A. PERRY, Administrator of Pink Perry, Deceased, *against* W. N. C. RAILROAD CO. } Reply.

The plaintiff, replying to the new matter in the defendant's answer, says:

1. That it is not true that the injury to plaintiff's intestate was caused by the negligence or carelessness of said intestate in attempting to cross the defendant's track, nor is it true, as plaintiff
41 is informed and believes, that said intestate was, when injured, attempting to cross the track immediately in front of the moving train, which he saw and knew to be moving.

2. That it is not true, as alleged in defendant's answer, as plaintiff is advised, informed and believes, that plaintiff's intestate was a tresspasser upon the defendant's railroad track, nor is it true that the proximate cause of said injury was the attempt of said intestate to cross the track before a moving train.

3. That it (is) not true, as plaintiff is advised, informed and believes, that his said intestate contributed to his injury by attempting to cross the defendant's track immediately before a train which he saw and knew was moving, and the plaintiff avers if said intestate did not exercise proper care in guarding against injury that notwithstanding any carelessness on the part of said intestate the injury which resulted in his death might have been averted had the defendant exercised due care and diligence by keeping a proper lookout, and so using the application at its command after its engineer discovered or might, by proper watchfulness, have discovered, that said intestate was exposed to danger by having his foot fastened between the railing of the defendant's track and the steps of its freight depot, so that he could not extricate himself.

And for a further reply to the new matter contained in the defendant's answer, the plaintiff says:

1. That he is informed and believes, it is not true, as alleged in the answer, that the defendant company was, on the 2nd day of September, 1884, indebted to the Central Trust Company of New York in the sum of four millions of dollars, though it is admitted that a mortgage deed was executed by the defendant company purporting to convey its franchise, privileges and property to the said Central Trust Company of New York, as alleged in said answer.

2. That, as plaintiff is informed and believes, the said mortgage deed was at some time registered in the office of the register of
42 deeds for the county of Rowan, but plaintiff has no information as to whether it was ever registered in the county of Burke.

3. That plaintiff has no knowledge as to the truth of the allegation that the defendant company, in the month of April, 1894 made default in the payment of any indebtedness due from it to the Central Trust Company of New York and upon information and belief

denies that there was any such indebtedness or default in payment, and this defendant upon information and belief further denies that the Southern Railway Company ever became the purchaser or owner of the franchise and property of the defendant company, by any purchase or pretended purchase, on the 21st day of August, 1894, or at any other time, and avers, upon information and belief, that the deed under which the Southern Railway Company claims in fact purports to convey only the equity of redemption, subject to an outstanding first mortgage of defendant's franchise and property to said Central Trust Company of New York. That, as plaintiff is advised, informed and believes, the circuit court of the U. S. for the western district of N. C., did not as alleged, in the answer, confirm by a decree a sale of the franchise and property of the defendant and a purchase of the same by the Southern Railway Company, and the plaintiff (avers) that if such order had been made the said Southern Railway Company had no power or authority to take or to hold the franchise and property of the defendant company, and that any such pretended purchase was null and void.

5. That the plaintiff has no information or belief as to the truth of the allegation contained in the answer, that the special master executed and delivered a deed purporting to convey the franchise and property of the defendant company; and if such deed was executed, the plaintiff denies that the Southern Railway Company had the capacity to take or hold the franchise of the defendant company as the absolute owner of said franchise and property.

6. That it is true, as plaintiff is informed and believes, that since some time in the summer or fall of the year 1894 the
43 Southern Railway Company has been in possession of the road-bed and property of the defendant company, and has been operating said road as carrier of freight and passengers, but the plaintiff denies that the Southern Railway Company has operated said road or held possession of its property as the sole and absolute owner thereof. On the contrary, the plaintiff avers, upon information and belief, that by the terms of the decree of the said circuit court, by authority of which the defendant claims in its answer that the Southern Railway Company became the purchaser of its franchise and property, it was ordered by the court that the purchaser under said decree should have the right to elect whether such purchaser or purchasers would hold and operate the defendant company's road as owners of the franchise and property or as the owners, assignees and purchasers of a lease for ninety-nine years, therefore, executed by the defendant company of its franchise and property to the Richmond and Danville Railroad Company, as aforesaid, may have been *ultra vires*, the plaintiff is advised and therefore avers that the defendant company, being a party to said decree purporting to confer said right of election on the purchasers under it, is estopped as to all persons dealing with the Southern railway as the operator of its road from denying that the relation of lessor and lessee actually existed after the summer of 1894, and has continued to exist between the defendant company and the said Southern Railway Company.

7. That it is not true, as alleged in the answer, that since the sale under a decree in the year 1894 the defendant company has had nothing to do with the operation of the Western North Carolina railroad or its franchise and property, if it was meant thereby to convey the idea that the defendant company was not responsible as lessor for the acts or torts committed by the said Southern Railway Company. And the plaintiff avers that the said Southern Railway Company had no power or authority conferred upon it by law to purchase the franchise and property of the defendant company
44 or the equity of redemption therein and that the defendant company was not in fact authorized or empowered to lease or demise its franchise and property when it attempted to do so by the pretended lease to the Richmond and Danville Railroad Company, as aforesaid; but plaintiff is advised, informed and believes, and therefore avers that the defendant company voluntarily permitted the Southern Railway Company to take possession of all of its road-bed and property including such property as was acquired under the authority delegated to it by the State of North Carolina, in the exercise of the right of eminent domain, and without authority of law permitted the said Southern Railway Company to operate its road as a carrier of freight and passengers. But plaintiff is advised and therefore avers that the defendant company could not rid itself of the responsibility of discharging its duty as a carrier of freight and passengers by virtue of the authority conferred in its charter and the defendant company is answerable in damages for any injury caused by want of ordinary care on the part of any company to which it has attempted to transfer its franchise and property, though said attempted transfer may have been ineffectual.

Wherefore, plaintiff demands judgment for the sum of $10,000 and costs.

A. C. AVERY,
I. T. AVERY,
M. SILVER,
Att'ys for Plaintiff.

J. A. Perry, administrator of Pink Perry, maketh oath that the facts set forth in the foregoing reply as of his own knowledge are true, and those stated on information and belief, he believes to be true.

J. A. PERRY.

Sworn to and subscribed before me, this 30th day of April A. D. 1897.

P. W. PATTON,
Clerk Superior Court,
Per J. W. AVERY, *D. C.*

45 NORTH CAROLINA, }
Burke County. }

Superior Court, August Term, 1901.

J. A. PERRY, Administrator of Pink Perry, Deceased, }
vs.
THE WESTERN NORTH CAROLINA RAILROAD COMPANY. }

At a superior court begun and held in and for the county of Burke on the 19th day of August A. D., 1901, present the Hon. M. H. Justice, judge presiding.

This cause coming on to be heard and a jury being impannelled and a trial had and the jury having found the issues in favor of the plaintiff and assessed his damages at five thousand ($5,000.00) dollars, it is now on motion of Avery & Avery, Avery & Ervin and M. Silver, counsel for the plaintiffs, considered and adjudged by the court that the plaintiff J. A. Perry, administrator of Pink Perry, do have and recover of the defendant, The Western North Carolina Railroad Company, the sum of five thousand ($5,000.00) dollars, with interest thereon from the 19th day of August 1901 at six per cent. per annum till paid.

It is further considered and adjudged that the plaintiff J. A. Perry, administrator of Pink Perry do recover of the defendant The Western North Carolina Railroad Company his costs of action to be taxed by the clerk of this court.

M. H. JUSTICE,
Judge Presiding.

46 NORTH CAROLINA, }
Burke County. }

I, P. W. Patton, clerk of the superior court of Burke county, do hereby certify that the foregoing is a full and perfect copy of the summon-, complaint, answer, reply and judgment on file in my office in the case of J. A. Perry, administrator of Pink Perry, against The Western North Carolina Railroad Company.

In testimony whereof, I have hereunto set my hand and official seal at office in Morganton, North Carolina, this October 15th, A. D. 1901.

P. W. PATTON,
Clerk Superior Court, Burke County, N. C.

47 COMPLAINANT'S EXHIBIT.

Filed Oct. 25, 1902.

STATE OF NORTH CAROLINA, *Buncombe County.*

In the Superior Court.

J. E. BROWN, Administrator of Fletcher Brown, Dec'd,
vs.
SOUTHERN RAILWAY CO., CITY OF ASHEVILLE, ET ALS.

Summons was issued in the above-entitled cause on the 30th day of January, 1901, by Marcus Erwin, clerk of the superior court of Buncombe county. The defendants named in the summons are, Southern R'y Co., City of Asheville, J. F. Lowe and Boney Brooks.

At the October term 1901 of the superior court of Bumcombe county upon affidavit of Charles A. Moore, Esq., the Western North Carolina Railroad Co. was made a party defendant by order of his honor Fred Moore, judge presiding.

48 Complaint filed April 24, 1901. Damages claimed $30,000.00.

Answer filed May 30, 1901.

Order made 18th day of May, 1901 by Hon. James E. Boyd, judge of the United States court, removing this cause into the circuit court of the United States for the western district of North Carolina.

Judge Boyd's order, with accompanying bond, affidavit, etc., filed in the office of the clerk of the superior court of Buncombe county June 1, 1901.

STATE OF NORTH CAROLINA, *Buncombe County.*

I, Marcus Erwin, clerk of the superior court of Bunconbe county, do hereby certify that the foregoing is a true and correct statement of the record in my office in the case of J. E. Brown, administrator of Fletcher Brown, *vs.* Southern Railway Company *et als.*

This October 24, 1901.

(Seal of Court.)

MARCUS ERWIN,
Clerk Superior Court,
Per J. B. CAIN, *D. C.*

49 COMPLAINANT'S EXHIBIT.

Filed Oct. 25, 1901.

STATE OF NORTH CAROLINA, }
Buncombe County. }

In the Superior Court.

BAXTER L. SORRELLS, Adm'r of Arch Whitener,
vs.
SOUTHERN RAILWAY Co. and WESTERN NORTH CAROLINA RAILroad Company.

Summons was issued in the above-entitled cause by Marcus Erwin, clerk of the superior court of Buncombe county on 6th day of February, 1900.

Summons was served on the Southern Railway Co. by delivering a copy of the summons to Frank Darby, agent of the Southern Railway Co. at Asheville, and a copy to J. E. Rankin, director of the Western North Carolina Railroad Company, April 20th, 1900.

Consent order to file pleadings May term 1900.

Consent order to file pleadings August term 1900.

Order to file pleadings November term 1900.

Complaint filed on the 26th day of October 1900.

Damages claimed $20,000.00.

Answer filed March 30th, 1901.

50 On April 22nd Hon. James E. Boyd, United States judge, made an order removing this cause into the circuit court of the United States for the western district of North Carolina.

The order of Judge Boyd was filed in the office of the clerk of the superior court of Buncombe county, on April 26, 1901.

STATE OF NORTH CAROLINA, }
Buncombe County. }

I, Marcus Erwin, clerk of the superior court of Buncombe county, do hereby certify that the foregoing is a true and correct memorandum of the record in my office in the case of Baxter L. Sorrells, administrator of Arch Whitener, *vs.* Southern Railway Co. *et als.*

This October 24, 1901.

[Seal of Court.]

MARCUS ERWIN,
Clerk Superior Court,
Per J. B. CAIN, *D. C.*

51 EXHIBIT "B."

In the Circuit Court of the United States, Western District of North Carolina.

IN THE MATTER OF THE SUIT OF THE CENTRAL TRUST COMPANY of New York, Complainant,
vs.
THE WESTERN NORTH CAROLINA RAILROAD COMPANY, Respondent.

This cause coming on to be heard upon motion for a decree in accordance with the mandate of the circuit court of appeals for this, the fourth circuit of the United States, sitting in the city of Richmond, Virginia, the said mandate bearing date the 11th of November, 1899, and being in the following words:

"It is now here ordered and adjudged and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed, with costs, so far as it grants the injunction enjoining the further prosecution of the bill which was filed, but the said cause is remanded to the circuit court of the United States for the western district of North Carolina, at Charlotte, with direction to modify the said decree in accordance with the opinion of this court.

It is further ordered that the mandate of this court issue after the expiration of twenty days from the date hereof:" It is upon the supplemental bill, answers, appl-cations, former orders, decrees and other evidence in the cause, decreed that the Southern Railway Company is the lawful owner of the Western North Carolina railroad, together with the franchises of the Western North Carolina Railroad Company, as against any claim of stockholders of said company, having become such owner by reason of the purchase of the same as set out in the supplemental bill filed in this cause, by virtue of the sale under the decree, which concludes said stockholders, but does not preclude James, administratrix, and Howard, administratrix, as personal representatives from proceeding in the State courts in any action not involving their rights as stockholders of the said company.

It is further ordered, adjudged and decreed that the respondents, S. T. Pearson, Mrs. Clemye James and Mrs. Fannie Howard, being the personal representatives of James and Howard, deceased, as set out in the bill, and all other persons who have made themselves parties to the suit, numbered 167½, the State court, Rowan county, entitled Pearson *et al. vs.* The Western North Carolina Railroad Company, in this judicial district, be, and are forever restrained and prohibited from proceeding any further in the prosecution of the action set out in the supplemental bill filed in this cause.

And, in obedience to the said mandate, and in accordance with the said opinion of the said circuit court of appeals, the decree heretofore entered in this cause by his honor Judge Simonton is so mod-

ified as not to prohibit the said Clemye James, adm'x, W. A. James' or Fannie Howard, adm'x, of Jno. H. Howard, from proceeding as they may be advised with any other suit not based upon the supposed rights of stockholders of the Western North Carolina Railroad Company with respect to enforcing their judgment claim. And it is ordered and decreed that the said respondents pay the costs of this proceeding, the same to be taxed by the clerk of this court.

At Hendersonville, N. C., this 23rd day of April, 1900.

(Signed) H. G. EWART,
U. S. Judge.

Copy from file in office of H. C. Cowles, clerk.
Filed April 25th, 1900.

52 *Opinion.*

Filed Dec. 19, 1901.

In the Circuit Court of the United States for the Western District of North Carolina, at Greensboro, N. C., December 19th, 1901.

CENTRAL TRUST COMPANY OF NEW YORK
vs.
WESTERN NORTH CAROLINA RAILROAD COMPANY ET AL.

Charles Price for complainant; A. C. Avery, B. F. Long and Lee S. Overman for defendants.

BOYD, *District Judge:*

This is a bill, supplemental to, and in aid of, the original bill, of foreclosure, filed by the Central Trust Company of New York, as trustee, to foreclose a second mortgage, executed by the Western North Carolina Railroad Company, a North Carolina corporation, upon its property, of every kind, including the franchises of the corporation. This second mortgage, covered, of course, the equity of redemption, of the corporation. Indeed, after the execution of the first mortgage, all the right, title and estate of the Western North Carolina railroad corporation, in and to the Western North Carolina railroad, equipment, and franchises, except the one, to be, and exist, as a corporation, known as that of the corporators, was the right to redeem, its equity of redemption. This was conveyed to the Central Trust Company of New York, as trustee,
53 for the bondholders, whose bonds were secured by that mortgage, known as the second mortgage. Upon the foreclosure of this mortgage, sale of the property, and franchises, so conveyed, the decree of confirmation of sale, and the execution and delivery of the deed, the Western North Carolina Railroad Company, had no estate of any kind, whatsoever, in the Western North Carolina railroad, equipment, or franchises, of the corporations, so conveyed in trust, and so sold, under the decree of this court, to the Southern Railway Company, which company, complainant in this

bill, was, on the 23rd day of August 1894, duly accepted by the court, as the purchaser "of all and singular the railroad property and franchises, sold under the decree of this *cause*." This appears from the decree of confirmation of sale, of the date above stated, duly entered upon the records of this court.

It is also set out in the said decree, that, upon the delivery of the conveyance by the master to the purchaser, the Southern Railway Company, the said company "shall fully possess, and be invested with, all of the estate, right, title, and interest, in, to and of, such railroad equipment, property and franchises so sold, under the decree of this court, as the absolute owner thereof, to have and to hold, the same, to it, and its successors, and assigns, forever."

This was the decree of the court, entered the 22nd of August, 1894.

Since that time, the Western North Carolina Railroad Company, if, in existence, has been without property, of any
54 nature whatsoever.

Since that time, as shown by Circuit Judge Simonton, in his opinion in this case, reported in Fed. Reporter vol. 89 page 24, the Western North Carolina railroad corporation has had no property, no franchise, except the franchise of the corporators, which is, that to exist as a corporation. It has had no railroad, it has no right to operate a railroad, no right to construct a railroad, no right of eminent domain. Its railroad was sold, every franchise it owned, except the one mentioned—to exist as a corporation,—was sold and purchased, under the decrees of this court, by the complainant, The Southern Railway Company, a Virginia corporation, do- business under the laws of comity, in the State of North Carolina.

This was the status of affairs at the time the engineer James, intestate, and fireman, Howard, intestate, were killed on the line of this railroad, on the 17th of November, 1896, as appears by the record, filed herein.

These men were servants of the Southern Railway Company, when killed, it not being pretended, they were employed by the Western North Carolina Railroad Company.

As already shown they could not have been employed by that company, it having no power to employ servants, such power, such right, one of its franchises, having been sold, and purchased by complainant, The Southern Railway Company, in 1894 *two years before the deaths of these men*, these servants, James and Howard—Memphis & L. R. Co. *vs.* Railroad Cons. 112 U. S. Rep. 610. New Orleans etc. *vs.* Delamore, 114 U. S. Rep. 501.

55 At this point, the above cases are cited, to show the well-known, well-recognized, distinction between a franchise, to exist as a corporation, known as the franchises, of the corporators, and the franchise to exercise the rights, powers and privileges, conferred by its charter, upon the corporation, known as the franchise of the corporation. The latter is, in one sense, the property of the corporation, and can be mortgaged by the corporation if so empowered, by the sovereign granting its charter of incorporation. This franchise was mortgaged, the charter of the company, and the stat-

utes of the State, having so authorized, together with its other property. The power to mortgage, carries with it the power to foreclose and sell. To render this latter power effective, there is carried with it, the power of foreclosure and sale—New Orleans etc. *vs.* Delamore, 114 U. S. R. 501. The principles laid down in this case, are interesting, and very pertinent to those involved in the case now being considered.

So there was a mortgage, a foreclosure, and sale, and, at the time of the deaths of these men, the Southern Railway Company was in possession of this railroad, its absolute owner, as already shown.

It was in possession of the railroad, and operating it, under and by virtue of the franchise of the corporation, conveyed to it by the court, under the decree of foreclosure and sale.

56 At the February and March term, of the superior court of Rowan county, for the year 1898, two judgments, one in favor of James, administratrix, and the other in favor of Howard, administratrix, rendered against the Western North Carolina Railroad Company, were duly entered of record in the said court.

Upon these judgments executions were issued in due form, against the Western North Carolina Railroad Company, on the 3rd day of September, 1901, and placed in the hands of the defendant, D. R. Julian, sheriff of the county of Rowan, to be served as final process, directing him, to satisfy the judgments out of the personal property of the defendant, within his county, or if sufficient personal property "could not be found, then out of the real property of the defendant" within his county "*as owned and held by it on the day*" when the said judgments were docketed in the county of Rowan.

Having the final process in his hands, directing him to satisfy the judgments, upon which, issued, one in the sum of fifteen thousand dollars, and the other five thousand dollars, the former in favor of James, adm'x, and the latter, of Howard, adm'x, it is to be observed, that the property out of which satisfaction was ordered to be made was that "*owned and held by it on the day* when the said judgments were so docketed, in the county of Rowan."

This is the exact language of the process, the executions. Then, in looking for property "owned and held by it" The Western North Carolina Railroad Company, defendant in the execution, "on the

57 day- when the said judgments were docketed, in March and February, 1898, this property, advertised for sale, that is to say the Western North Carolina railroad, equipment and franchises, was found, not "owned and held" by the defendant, but by the Southern Railway Company. This ownership is evidenced by a deed, duly registered, in the office of the register of deeds for the county of Rowan, on the 5th day of November, 1894, in Book 76, pages 505 etc., made and executed, in accordance with the decrees of this court. So that, unless that deed was a nullity, and the decrees of this court, duly entered, also, nullities, this property, the railroad and franchises, was the property of the Southern Railway Company, the Western North Carolina Railroad Company having, at the time, no estate of any kind, or character, in or to, the same. And when the sheriff, defendant, proceeded to levy the executions

in his hands, directed against the Western North Carolina Railroad Company, and its property, upon the property and franchises, so conveyed, he committed a trespass, upon the rights and property of the Southern Railway Company, which company, this court had accepted as the purchaser of the property and franchises, years before James and Howard, intestates, were killed, and which company, was, at the time, in the quiet and undisturbed possession of the property, and franchises, as it was, on the day, the said judgments were docketed in 1898; and, as it was, on the day, these executions were levied by the defendant, Julian.

The sheriff having advertised this property for sale, and
58 published that he would, on the 7th day of October, 1901, sell the same, "agreeably to the laws of the State in this behalf provides," the complainants, on the 5th day of October, 1901, filed this bill, praying in substance, that this officer be restrained and enjoined from proceeding further with this sale.

This is a supplemental bill, and clearly, the complainants are entitled to the relief they ask. The jurisdiction of the circuit court *court* of the United States was exercised over the property when the bill for foreclosure and sale was filed, and the decree of sale entered.

The property and franchises came then, within its jurisdiction and under its protection.

After this decree of sale, after the foreclosure sale, and decree of confirmation of sale, in which it was decreed, on the 23rd day of August, 1894, that the "Southern Railway Company shall fully possess, and be invested with, all of the estate, right, title and interest, in, to and of, such railroad equipment, property and franchises, so sold, under the decree of this court, as the absolute owner thereof to have and to hold the same, to it and its successors, and assigns, forever;" and after the execution and delivery of the deed, conveying this property, to the purchaser, in accordance with these decrees, any process, issuing from any court, against the property so sold and conveyed, on account of anything done, or omitted to be done, by the Western North Carolina Railroad Company, is void, and a nullity. Covell *vs.* Heyman, 111 U. S. Rep. 176.

In this case, Justice Matthews says: "To attempt to
59 seize" property under like circumstances, "by a foreign process, is futile and void." It would be "nothing less, than lawless violence." *Ibid.* It would be a mockery to say, that this court cannot, under conditions like the present, protect its purchaser in the enjoyment of its property, bought as this property was, under the decrees of this court. Having taken this property, within its jurisdiction, and exercised the same over it, long before the deaths of James and Howard, it cannot be taken in execution to satisfy judgments against the Western North Carolina Railroad Company, obtained against it, for its negligence, thereafter, in causing these deaths. The decree of confirmation of sale, expressly provides, that the purchaser takes the property and franchises, "free from any one, claiming by, under, or through, the Western North Carolina Railroad Company." This claim on account of its negligence, by under or through the Western North Carolina Railroad Company,

had its origin, in events transpiring after the sale, and conveyance to the Southern Railway Company, in pursuance of the decrees of this court, and long after the purchaser was fully possessed of the property and franchises, so sold and conveyed.

When the decree of foreclosure was entered, on the 5th day of May 1894, the corporation, respondent, and stockholders were bound by it. So likewise, are all claiming under, by or through the corporation or stockholders. The decree of foreclosure is conclusive against them all. It is not only so in law, but so, expressly provided in the decree of confirmation of sale, entered in this suit
60 on the 22nd day of August 1894.

It has not been suggested, that this court in the foreclosure suit, this original suit, had not jurisdiction of the cause. All of its decrees entered from time to time in its progress were in due course of the court, in due form and order. Yet, the levies made by the defendant Julian, sheriff, and the advertisements of sale "agreeably of law," which required the officer to seize the railroad immediately after sale, and deliver it to the purchaser, condemn this foreclosure suit, its legality and validity. This conduct by the sheriff is in defiance of the orders and decrees of the court, so entered in this suit. When the court took possession of the mortgaged property, the corporation was represented, as were the stockholders and when the decrees were entered all issues were decided; there was a final adjudication of the rights of the stockholders and of those of the corporation There was nothing that respondent corporation could do to bind this property after the final decree was entered confirming the sale of the same, now, about to be seized by the defendant, Julian, in satisfaction of the judgments obtained against it after the sale upon alleged causes of action, which arose also long thereafter.

Section 674 of the Code of North Carolina, makes it the duty of the officer making the sale to deliver possession of the railroad to the highest bidder at the sale. "*The officer shall immediately after such sale,* deliver to the purchaser possession of all the corporate, real property connected with the franchise belonging to such corporation &c."
61 This is the language of the statute. To do this would work irreparable damage to the complainant. The notice of sale, and sale would be to cast a cloud upon the title of the complainant to this property, to prevent which the court is asked to issue its injunction, "the unquestionable right and power of this court."

Central Trust Company *vs.* Western North Carolina Railroad Co., Fed. Rep. 89, page 24. Rodgers *vs.* Pitt, *et al.*, 96 Fed. Rep. 668.

In this last case, all the cases are cited, bearing upon this question of the jurisdiction of the Federal and State courts, over the same subject-matter, and upon the right of one court to restrain proceedings in another.

There can be no conflict of jurisdiction between the courts, State and Federal, under our system of government. To prevent it, it is only necessary to observe the laws of comity between the courts. A

State court will not be so regardless of the comity which does exist, and should exist between courts, sitting within the same territory, as to sit in judgment upon the validity of a decree of a Federal court, entered in the exercise of its jurisdiction long before the jurisdiction of the State court is attempting to be asserted. Nor on the other hand, will a Federal court be so regardless of that comity as to assert jurisdiction over the subject-matter of a suit, over which the State court has already assumed jurisdiction.

In the judicial history of this country, this law of comity has always been observed, and as long as it is there can be no
62 conflict.

Central Trust Company of New York *vs.* Western North Carolina Railroad Company 89 Fed. Rep. 24; Rodgers *vs.* Pitt, 96 Fed. Rep. 668. Covell *vs.* Heyman, 111 U. S. R. 176. French *vs.* Hay, 22 Wallace, 250, 253. Dietzsch *vs.* Huidekoper, 103 U. S. 494. Fiske *vs.* Railroad, 10 Blatchford, 518, Fed. Cases, No. 4,830. President *vs.* Merritt, 56 Fed. Rep. 329. Wadley *vs.* Blount, 65 Fed. Rep. 667.

In Union Trust Company *vs.* Rockford &c. the court said: "The main question arising is one of great delicacy, and the history of the jurisprudence of this country shows *that* a most commendable disposition on the part of both the Federal and State courts not to impinge upon each other's jurisdiction, but the delicate nature of the matter furnishes no reason why the court to which the jurisdiction belongs should not firmly assert and maintain its rights."

Union Trust Co., *vs.* Rockford, R. I. and St. L. R. Co., 6 Biss. 197 Fed. Cases No. 14,401. Nougee *vs.* Clapp, 101 U. S. R. 551.

The complainant, The Southern Railway Company, has filed this supplemental bill, together with the original complainant, The Central Trust Company of New York. This is done, as is well said by Judge Simonton, in his opinion in Fed. Rep. 89, already referred to, in accordance with the well-settled practice in the Federal courts. It may be as well after as before a decree. The authority for it is beyond question. It is fully discussed in the case of Root *vs.*
63 Woolworth, 150 U. S. 401.

It may be, however, as shown by that same judge, treated as an original bill, in aid of the original bill of foreclosure, filed in May 1894, dependent upon it, and ancillary to it. It was insisted in the argument, by the respondents, that this proceeding is in violation of section 720 of the Rev. Statutes. That section is taken from the original judiciary act of 1789, said to have been drawn by Oliver Ellsworth, at that time a Senator from Connecticut, and chairman of the committee to organize the judiciary, and is only in affirmance of the well-settled law of comity, which I have already discussed.

It is not to enjoin proceedings in a State court, as provided in that section, but to prevent the defeat and impairment of the jurisdiction

of this court already assumed and asserted in the original foreclosure suit, when the process in that suit was served and decree of foreclosure and sale entered. This injunction is prayed and granted to maintain that jurisdiction, which it is not denied was rightfully assumed in that suit. This same objection was urged by the respondents in all the cases relied on to maintain the jurisdiction of the court, cited in this argument. In every case it was clearly shown that the proceedings was not in violation of section 720, but taken, based upon the principles so clearly defined by Justice Matthews in the case of Covell *vs.* Heyman, 111 U. S. R. 176, and by Justice Miller *In re* Farmers' Loan and Trust Co., 129 U. S., 213. In the late case of Harkrady *vs.* Wadley, 172 U. S. R., Mr. Justice
64 Shiras, in his well-considered opinion, says, that the prohibition in section 720 "does not apply when the jurisdiction of a Federal court has first attached." He further says that this is so in cases of "ancillary bills, filed in the Federal courts to enforce their own judgments by preventing defeated parties from wresting property from plaintiffs, who by final judgments are entitled to it."

It is further suggested, indeed strenously insisted, that the principles laid down in this case were before the circuit court of appeals, and passed upon and that the court decided in effect the injunction should not issue. James, *et al. vs.* Central Trust Co. *et al.* 98 Fed. Rep. 489. I construe that decision to be in support of the contention of the complainant. It was an appeal from the decree entered upon the circuit by Judge Simonton in this suit. The injunction was granted as prayed for in the bill, and the decree appealed from affirmed, with the modification that, as drawn, it was broader than prayed for in the bill. Every principle laid down by Judge Simonton was affirmed, the court expressly holding, "that a circuit court of the United States is not prevented by Rev. Statutes, sec. 720 from granting an injunction against a proceeding in a State court when necessary to render effective its own decree."

The injunction is issued by the court to render effective its own decree; and when a stockholder, or any one claiming under, by or through the corporation, institutes a proceeding in a State court, whether it be a suit to declare void the decree, or the issuing
65 of executions against the property decreed to be sold and sold to a purchaser, he will be enjoined by this court. The injunction will issue to render effective the decrees heretofore entered.

The decree already referred to, adjudicating that the purchaser, the Southern Railway Company, is fully and absolutely possessed of this railroad, property and franchises free from the claim of any one, "by, under or through," this corporation is rendered ineffective, null and void by a seizure of this property by the sheriff, for and on account of a thing done by the corporation years after the sale and conveyance to the complainant, The Southern Railway Company. This process is void.

Let an injunction issue against the defendant, Julian, in this suit, and all others who join in the proceedings with him, in accordance

with the prayer of the bill, the same to remain in force until the further order of this court.

This 19th day of December 1901.

JAS. E. BOYD,
U. S. Judge.

66 *Decree.*

Filed Dec. 19, 1901.

In the Circuit Court of the United States for the Western District of North Carolina.

IN THE MATTER OF THE SUIT OF THE CENTRAL TRUST COMPANY of New York, Complainant,
against
THE WESTERN NORTH CAROLINA RAILROAD COMPANY ET AL., Defendants.

Decree.

This cause coming on to be heard upon the supplemental, answers, replications, former orders, petitions of James and others to be made parties, decrees, exhibits, papers and other evidence, and after argument of counsel, had in open court at the late regular October term for the year 1901, at Statesville; and after due consideration of all of the same, the court doth declare that the Southern Railway Company, a corporation, having become a party to this suit, is, together with The Central Trust Company of New York, the original complainant, entitled to the relief demanded in the supplemental bill.

The court doth further declare that the Southern Railway Company is the lawful owner of the Western North Carolina railroad, together with the franchises of the Western North Carolina Railroad Company, having become such by reason of its purchase of the same, as set out in the supplemental bill, and the former proceedings in this suit.

67 The court doth further declare that the said ownership of the Western North Carolina Railroad and "equipment, property and franchises" by the Southern Railway Company, the same sold under the decree of this court, is "free from any and all equity of redemption of the said Western North Carolina Railroad Company, or any one claiming by, under or through it, except the prior mortgage recited" in the decree of foreclosure and sale heretofore entered in this cause, in the due and orderly course of the court.

The court doth further declare that such ownership of the Western North Carolina railroad, equipment, property and franchises, as expressly provided in the decree of confirmation of the sale filed herein as an exhibit, the same having been entered in this suit on the 22nd day of August, 1894, duly made by the master, is absolute, and the Southern Railway Company became thereby, upon the delivery to it by the special master of his deed, on the said 22nd day

of August, 1894, filed herein also as an exhibit, fully possessed and "invested with all the estate, right, title and interest in, to and of such railroad, equipment, property and franchises aforesaid," of the said Western North Carolina Railroad Company, "to have and to hold the same to it and its successors and assigns forever."

And now it is, therefore ordered and decreed that the defendant, David R. Julian, high sheriff as alleged, be, and is, forever restrained, enjoined and prohibited from proceeding any further with a sale of the said railroad, property and franchises, as set out in the bill, so duly advertised by him for sale as alleged.

It is further ordered and decreed that the said Julian, so as aforesaid, is restrained and enjoined from advertising said property for sale, and from levying upon said property, or any part of the same, real or personal, for the purpose of satisfying the executions mentioned in the bill.

It is further ordered and decreed that the said Julian, so as aforesaid, is restrained and enjoined from taking any of the said property, levying on the same, or interfering with the same, whether real or personal, for the purpose of satisfying the said executions, or any executions or process of a similar nature that may be sued out by any one of the parties interested in the same.

It is further ordered and decreed that the said parties who have come into court and made themselves parties to this suit are forever restrained and enjoined from suing out any executions or other similar process against the property of the Southern Railway Company mentioned in the bill, to wit: The Western North Carolina railroad property and franchises, so purchased at the master's sale as aforesaid, in satisfaction of the judgments rendered in the actions of James and Howard, the same set out in the bill.

It is further ordered, adjudged and decreed that adjudication of the liability for the costs of this proceeding await the final determination of this case.

Let this decree be entered.

JAS. E. BOYD,
U. S. Judge.

Dec. 19th, 1901.

68 *Petition on Appeal and Allowance of Same.*

Filed Dec. 19, 1901.

Circuit Court of the United States, Fourth Circuit, Western District of North Carolina. In Equity.

D. R. JULIAN, Sheriff of Rowan County; CLEMYE JAMES, Administratrix of W. A. James, and Fannie E. Howard, Administratrix of John H. A. Howard, Appellants,
vs.
THE CENTRAL TRUST COMPANY and THE SOUTHERN RAILWAY Company, Appellees.

The above-named, D. R. Julian, sheriff of Rowan county, Clemye James, administratrix of W. A. James and Fannie E. Howard, administratrix of John H. A. Howard, who were defendants and respondents in the supplemental suit, begun by supplemental bill by the appellees above named, conceiving themselves aggrieved by the decree made and entered on the 19th day of December A. D. 1901, in said cause, do hereby appeal from the said order and decree entered in favor of the appellees above named, in the circuit court at Greensboro, by Hon. James E. Boyd, judge presiding on said 18th day of December, and who had theretofore presided at the hearing of said cause in the circuit court at Statesville on the — day of October A. D. 1901 at October term, and had held the matters in controversy under *adversari* till said 18th day of December,
69 when counsel, in pursuance of notice appeared before him, do hereby appeal from said order and decree entered in equity on said 18th day of December to the United States circuit court of appeals, for the fourth circuit, and they pray that this appeal may be allowed, and that a transcript of the record of proceedings and papers upon which said order or decree is made, duly authenticated, may be sent to the circuit court of appeals of the fourth circuit of the United States.

LEE S. OVERMAN.
B. F. LONG.
A. C. AVERY.

Dated December 19, A. D. 1901.

The foregoing claim of appeal is allowed.

JAS. E. BOYD,
U. S. Judge Presiding in Circuit Court.

70 *Assignment of Errors.*

Filed Dec. 19, 1902.

Circuit Court of the United States, Fourth Circuit, Western District of North Carolina. In Equity.

D. R. JULIAN, Sheriff of Rowan County; Clemye James, Administratrix of W. A. James, and Fannie E. Howard, Administratrix of John H. A. Howard, Appellants,
vs.
THE CENTRAL TRUST COMPANY OF NEW York and The Southern Railway Company, Appellees.
} Assignments of Errors.

And now, on the 19th day of December A. D. 1901, comes the above-nemed appellants, D. R. Julian, sheriff of Rowan county, Clemmye James, administratrix of W. A. James, and Fannie E. Howard, administratrix of John H. A. Howard, by Lee S. Overman, A. C. Avery and B. F. Long, their solicitors, and say that the decree filed and entered in said cause, on the 19th day of December 1901, is erroneous and against the just rights of the said defendants, appellants here, for the following reasons:

First. Because the court was in error, upon the pleadings, records and proofs offered, in granting the said decree, as appears in the record.

Second. Because the court did not follow the decisions and adjudications of the supreme court of North Carolina, con-
71 struing the constitution and laws of said State, especially the charter of the Western North Carolina Railroad Company and the pertinent statutes of said State cited in James *vs.* The Western North Carolina Railroad Company.

Third. Because the said decree is not in accordance with decisions and opinions of the circuit court of appeals, fourth circuit, heretofore entered in this cause, in which the court held, that the defendants Clemmye James, administratrix of W. A. James, and Fannie E. Howard, administratrix of John H. A. Howard not being parties to the foreclosure proceedings, should be left free to proceed, as they may be advised, in accordance with the laws of North Carolina, in the enforcement of their judgments.

Fourth. Because the recitals in the said decree are not warranted by, but are at variance with, the facts which appear from the record and the undisputed evidence.

Fifth. Because the said decree deprives the defendant James, administratrix, and Howard, administratrix, from enforcing any lien which may exist in their favor, whereas the opinion, judgment and mandate in the cause supplemental to the original cause in this case, and entitled The Central Trust Company against Clemmye

James, administratrix of W. A. James, and Fannie E. Howard, administratrix of John H. A. Howard, declared that the said James, administratrix, and Howard, administratrix, should be left free to enforce any lien acquired by them against the franchise and property of the Western North Carolina Railroad Company, and the decree in said supplemental proceeding, to
72 which the Southern Railway Company was a party, adjudged and declared that the injunction against them should be dissolved, and the said supplemental bill, answers, exhibits, mandates, and decrees were set up in the answers of the said James, administratrix and the said Howard, administratrix, in support of the plea *res judicata*, and the court refused to adjudge that the plaintiffs herein were estopped by the said record and the said judgment from demanding the relief prayed for, which refusal the defendants assign as error.

Sixth. Because the court erred in refusing to dismiss the bill as to the defendant Julian upon the ground that he was not a proper party, but was the agent of the defendants James, administratrix and Howard, administratrix, and the suit could not be maintained without making them parties, and this the defendant Julian assigns as error.

Seventh. Because, upon the defendants James, administratrix and Howard, administratrix, entering a special appearance by their counsel and moving to dismiss the supplemental bill, the court refused the said motion, and further refused to entertain any motion made by the said James, administratrix, and Howard, administratrix, through their counsel, until a special appearance should be entered for them.

Eighth. Because the court erred in refusing, upon suggestion and motion of the counsel of said Jualin, James, administratrix, and Howard, administratrix, to strike out of the decree herein, before signing the same, all of the recitals therein contained on the ground that the said recitals were not in accordance with the decisions,
73 mandates, and decrees heretofore entered in the said cause entitled Central Trust Company and others against James, administratrix and others, to which cause all of the parties now before the court, who are parties in interest, were parties.

Ninth. Because the court erred in refusing to dismiss the bill, upon hearing the answer of the defendant Julian, wherein he pleaded specially that the plaintiffs were estopped by the judgment theretofore entered in the cause from demanding the relief prayed for against the defendants, James, administratrix, and Howard, administratrix, if it were conceded that the complainants were entitled to demand the relief prayed for as against the defendant Julian, the real parties in interest for whom he was acting as agent in making the levy and advertising, not having been brought before the court.

Tenth. Because the writ of injunction in this cause is granted by the court contrary to the express provisions of section 720 of the Revised Statutes of the United States and the decisions of the Supreme Court of the United States construing the same.

Eleventh. That when the case of James against The Western

North Carolina Railroad, 121 N. C. Reports, 528 was heard, the defendant in said case obtained from said court its opinion upon the effect and validity of the foreclosure proceedings had in the circuit court respecting the sale of said defendant road and the construction of the statutes of North Carolina as effecting the same, thereby raising a Federal question, but defendant in that case failed
74 to appeal and lost its rights of appeal to the Supreme Court of the United States to reverse said opinion. That afterwards when the case of James, administratrix *et als.*, against The Central Trust Company of New York, *et al.* No. 289 was heard in the circuit court of appeals and the opinion of the court and judgment agreeably to the mandate thereof was entered in said case, the appellees failed to appeal and lost their appeal from said judgment. It is assigned as error because his honor did not dismiss this bill and hold appellees estopped for reasons herein stated.

Twelfth. Because the court failed to dismiss the bill for that an injunction will not be granted to stay an execution regularly issued upon a judgment because the judgment creditor threatens or has it levied upon property claimed to be owned by another, and in failing to hold that a sale under such circumstances, if the contentions of appellees are true, would pass no title and that they would not thereby be exposed to irreparable injury, or have any cloud cast upon their title.

Wherefore the said defendants, appellants, pray that the said decree be reversed and that the said court may be directed to enter a decree in accordance with the prayer of the appellants.

A. C. AVERY,
LEE S. OVERMAN,
B. F. LONG,
Solicitors for the Defendants, Appellants.

75 *Order Extending Time to File Appeal Bond.*

Filed Dec. 19, 1902.

Circuit Court of the United States, Western District of North Carolina, Adjourned Term, at Greensboro, December 19, 1901.

CENTRAL TRUST COMPANY OF NEW YORK *et als.* *vs.* THE WESTERN NORTH CAROLINA Railroad Company *et als.* } Motion of the Southern Railway Company for Injunction against D. R. Julian.

In this case, the injunction having this day been ordered as prayed for by the complainant, and the defendant having taken an appeal to the circuit court of appeals from the decree.

It is, thereupon, ordered, that the bond for costs for the appellant is fixed at the sum of one hundred dollars upon the said appeal, and the time to execute and file the same is enlarged until the tenth of

January 1902. This order is made in open court, and by consent of attorneys for the appellant and the appellee.

JAS. E. BOYD,
U. S. Judge.

76 *Citation on Appeal.*

Filed Dec. 19, 1902.

UNITED STATES OF AMERICA, *Fourth Judicial Circuit,* } ss:

United States Circuit Court of Appeals for Fourth Circuit.

To the Southern Railway Company and the Central Trust Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals, to be holden at the city of Richmond, in said circuit, on the 15th day of January, A. D. 1902, pursuant to an appeal from a decree of the circuit court of the United States for the western district of North Carolina, fourth circuit, rendered at Greensboro on the 19th day of December A. D. 1901, in your favor, in a cause depending in said court, which had been heard upon supplemental bill and answer of respondents on the — day of October, A. D. 1901, at the October term in the circuit court at Statesville in said district, and wherein The Central Trust Company of New York and The Southern Railway Company are complainants and David R. Julian, sheriff of Rowan county and Clemmye James, administratrix of W. A. James and Fannie E. Howard, administratrix of John H. A. Howard are defendants and respondents, named in said supplemental bill, to show cause, if any *they* be, why the decree rendered against the said defendants in the said cause above named (appellants here) should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of our Supreme Court, this the 18th day of December, in the year of our Lord one thousand nine hundred and one.

JAS. E. BOYD,
U. S. Judge.

I accept service of the foregoing citation on appeal this the 19th day of December A. D. 1901.

CHAS. PRICE,
Solicitor for Appellees.

[Endorsed:] Citation on appeal.

77 *Petition—Consent Thereto by Complainant—Order of Judge Boyd in Regard to the Filing of the Record.*

In the Circuit Court of the United States, Western District of North Carolina, Statesville, North Carolina, December 27th, 1901.

IN THE MATTER OF THE SUIT OF THE CENTRAL TRUST COMPANY of New York, Complainant,
vs.
THE WESTERN NORTH CAROLINA RAILROAD COMPANY and Others, Respondents.

To the honorable the judges of the circuit court of the United States:

Now come the appellants, Clemye James, administratrix of W. A. James, and Fannie E. Howard, administratrix of John H. A. Howard, by their counsel, Avery, Overman & Long, and allege:

First. That his honor James E. Boyd granted a decree of injunction against the appellants as set out in the record in the above-entitled cause on the 19th of December, 1901, from which decree appellants have appealed to the circuit court of appeals; that neither of the said appellants have any funds, moneys or estate belonging to the estates, respectively, of their intestates or individually, and they are utterly unable to give the securities or to make the deposit required by law, or to furnish the money to enable them to prosecute their said appeal in this cause and to defray the expense of printing of the record in the said cause, and they therefore pray the court to be allowed to prosecute the said appeal without bond and without printing the record in this cause.

78 Second. That heretofore, to wit: on the 8th day of October, 1898, his honor Charles H. Simonton, circuit judge, in a cause entitled Clemye James, administratrix of W. A. James and others, against The Central Trust Company of New York and Southern Railway Company, filed a decree in the circuit court at Charlotte, North Carolina, from which the said James, administratrix, and others appealed to the circuit court and the transcript of the record in said cause, which in many particulars is the same identical record as in this cause, was printed and filed in the circuit court of appeals in Richmond, October 10th, '98, and is now on file in the said cause, numbered on the docket of the said court No. 289, and subject to the inspection of the court.

Third. That the record in this cause, viz: the above-entitled cause, in which his honor Judge Boyd made the decree, has all been printed at the instance of the complainant above named, ten copies of which are now in the possession of the appellants and ready to be filed in the circuit court at Richmond in time for the hearing upon appeal, so that all and every part of the record in this cause material to its hearing has been already printed as aforesaid, except certain parts thereof, which are particularly set forth herein, the said several portions unprinted having been carefully gone over

item by item with Col. H. C. Cowles, clerk of the court at Statesville, the said portions being as follows:

1. Complainants' prosecution bond.
2. Equity, subpœna and return.
3. Answer of D. R. Julian, sheriff of Rowan.
4. Motion by attorneys of James, adm'r'x, and Howard, adm'r'x, to enter a special appearance and dismiss this proceeding for cause set forth in said motion.
5. Special appearance of attorneys for the respondents.
6. Appearance of James, adm'r'x, and Howard, adm'r'x, pleading to the jurisdiction.
7. Answer of James, adm'r'x, and Howard, adm'r'x, to bill in this cause.
8. Replication of the complainants.
9. Exhibits of complainant filed in the cause of certain
79 suits against the Western North Carolina railroad, viz: Giles *vs.* W. N. C. R. R. Co.; Perry *vs.* W. N. C. R. R. Co.; Brown, adm'r of Brown, *vs.* Southern Railway Company and City of Asheville; Sorrels, adm'r'x of Whitener, *vs.* Southern Railway Company and W. N. C. R. R. Co.
10. Decree of his honor Judge Boyd continuing injunction in this case.
11. Petition on appeal by respondents, appellants.
12. Citation on appeal.
13. Agreement of counsel as to printing.
14. Order extending time to file appeal bond.
15. Assignment of errors.
16. Opinion of his honor James E. Boyd.

Fourth. The said appellants, therefore, respectfully pray your honor to allow them to prosecute their appeal without requiring them to print the record in the cause so far as it has been unprinted as aforesaid, and pray your honor for an order permitting and allowing Col. H. C. Cowles, the clerk of the court, to furnish and deliver over to H. T. Meloney, the clerk of the circuit court of appeals, the original records in his office on file in this cause from 1 to 16, inclusive, as above set forth, in order that the cause may be heard upon the filing of the said original records along and together with the printed transcripts of the records in No. 289 aforesaid, and the printed record in this cause as aforesaid, ten copies of the latter of which the appellants are now ready to file with the clerk in Richmond.

AVERY, OVERMAN AND LONG,
Attorneys for the Appellants.

We, the attorneys for the appellants in the above-entitled cause, hereby certify to your honor that we believe that the appellants have a good and meritorious cause of action, and we know that the said James, administratrix, and Howard, administratrix, are without estate or property to enable them to prosecute the above action and appeal, and they respectfully ask the court that they may be

allowed to prosecute their appeal with the approval of the court as aforesaid.

A. C. AVERY,
LEE S. OVERMAN,
B. F. LONG,
Attorneys for the Appellants.

80 The undersigned, Charles Price, solicitor for complainants, hereby consents that the appeal of the appellants in the above-entitled cause may be heard without printing the record of the several items from 1 to 16 above referred to, and that the appeal may be heard upon the originals of the said several portions of the record being filed with the clerk of the circuit court of appeals in Richmond, and upon the printed record in the case in No. 289 aforesaid, and the other printed record printed by complainants in this cause as aforesaid.

This the 30 day of December, 1901.

CHAS. PRICE,
Solicitor for Complainants.

In the Circuit Court of the United States, Western District of North Carolina.

CENTRAL TRUST COMPANY OF NEW YORK
vs.
W. N. C. R. R. Co. ET ALS.

In the above-entitled appeal by the appellants, upon consideration of the foregoing petition, certificate of counsel and the consent of the solicitor of the complainant, it is hereby ordered that H. C. Cowles, clerk of the circuit court of the United States, western district of North Carolina, at Statesville, is hereby permitted and authorized to send to H. T. Meloney, clerk of the court of appeals, 4th circuit, at Richmond, all of the records in the above-entitled cause from 1 to 16, inclusive, as above set out in the petition for which said records may be used by the circuit court of appeals, if it sees proper so to do, in lieu of printing the same in connection with the other printed records referred to in the petition.

JAS. E. BOYD,
Judge in the Circuit Court of the United States, in Equity.

Filed in this office Jan. 1, 1902, as of Dec. 19, 1901.
H. C. COWLES, *Clerk.*

81 *Appeal Bond.*

Filed Jan. 9, 1901.

Know all men by these presents, that we Clemye James adm'x of W. A. James, and Fannie Howard adm'x of John H. A. Howard, and D. R. Julian, sheriff of Rowan county, as principals, and H. C. Trott and W. H. Miller as sureties, are held and firmly bound unto the Central Trust Company of New York in the full and just sum

of one hundred dollars to be paid to the said Central Trust Com pany appellee or its certain attorney, executor, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 6th day of January in the year of our Lord one thousand eight hundred and ninety-two.

Whereas, lately at a sitting of the circuit court of the U. States in a suit depending in said court, between The Central Trust Company of New York complainant and The Western North Carolina Railroad and Clemye James adm'x and Fannie E. Howard adm'x and D. R. Julian, sheriff, respondents a decree was rendered against the said D. R. Julian, sheriff, and Clemye James, adm'x and Fannie E. Howard, adm'x and the said sheriff and Clemye James adm'x and Fannie E. Howard adm'x having obtained an appeal to reverse the decree in the aforesaid suit, and a citation directed to the said complainant citing and admonishing it to be and appear at a United States circuit court of appeals for the fourth circuit to be holden at Richmond on the day in the said citation mentioned:

82 Now, the condition of the above obligation is such, that if the said D. R. Julian sh'ff and the said Clemye James adm'x and Fannie E. Howard adm'x shall prosecute their appeals to effect, and answer all damages and costs if they fail to make their plea good to the extent of the bond required by Judge Boyd: one hundred dollars, then the above obligation to be void; else to remain in full force and virtue.

CLEMYE JAMES, [SEAL.]
Adm'x W. A. James,
Per LEE S. OVERMAN, *Att'y.*
FANNIE E. HOWARD, [SEAL.]
Adm'x of John H. A. Howard.
D. R. JULIAN. [SEAL.]
H. C. TROTT. [SEAL.]
W. H. MILLER. [SEAL.]

Sealed and delivered in presence of—

——.

NORTH CAROLINA, }
Rowan County. }

Personally appeared before me this day H. C. Trott and W. H. Miller, residents and freeholders of said county and State, who made oath that they ar- each worth the sum of one hundred dollars, over and above all of their indebtedness and their homestead and personal exemptions allowed by law.

Witness my hand and official seal, this the 8th day of December A. D. 1901.

[NOTARIAL SEAL.] W. F. SMITH,
Notary Public.

Approved,
JAS. E. BOYD, *U. S. Judge.*
10th day of Jan'y 1902.

83 *Agreement of Counsel as to Printing.*

Filed Dec. 19, 1901.

Circuit Court of the United States, Western District of North Carolina, Fourth Circuit. In Equity.

D. R. JULIAN, Sheriff of Rowan Co.; Clemye James, Adm'x of W. A. James, and Fannie E. Howard, Adm'x of John H. A. Howard, Appellants,
vs.
THE CENTRAL TRUST CO. and THE SOUTHERN Railway Company, Appellees.
} Agreement of Counsel.

In this cause the said D. R. Julian and others, appellants, having appealed from the decree of his honor Jas. E. Boyd, made this day in this cause, it is agreed by the attorneys that the records, all and every part thereof, on file in the circuit court of appeals, 4th circuit, at Richmond, in the cause entitled Clemye James, adm'x, and others, appellants, *vs.* The Central Trust Company of New York and The Southern Railway Company, appellees, may be used without printing the same, or any part of the same, in this appeal—it shall only be necessary to print the record of the new matter in this supplemental bill and not contained in said former transcripts. This 19th Dec'r, 1901.

AVERY, OVERMAN & LONG,
Solicitors for Appellants.
CHAS. PRICE, *Sol. for Appellees.*

84 *Other Printed Record Filed with the Original Papers & Referred to in Agreement of Attorneys.*

In the Circuit Court of the United States, Western District of North Carolina, Statesville, North Carolina, October 1st, 1901.

IN THE MATTER OF THE SUIT OF THE CENTRAL TRUST COMPANY of New York, Complainant,
against
THE WESTERN NORTH CAROLINA RAILROAD COMPANY and Others, Respondents, Depending in the United States Circuit Court for the Western District of North Carolina.

To the honorable the judges of the circuit court of the United States:

Now comes the complainant, The Central Trust Company of New York, your orator, and alleges:

1. That, as appears from the record in this suit, hereto attached, pages 1, 2, 3, etc, and marked Exhibit A, the complainant, exhibited

its original bill of complaint, in this honorable court, against the respondent, on or about the 20th day of April, 1894; and a decree was passed on the 2nd of May, 1894, and duly entered, on the 5th of May, 1894, granting the relief prayed for, in the bill to wit; the foreclosure and sale of the Western North Carolina railroad, and all other property of the Western North Carolina Railroad Company, including its franchises. See pages 31, 32, 33, etc., of record, Exhibit A.

2. That the said railroad, and other property, including the said franchises, were sold, in pursuance of this decree, by a master,
85 duly appointed, by this court, on the 21st day of August, 1894, when the Southern Railway Company, a corporation, duly, and originally, created, organized, and existing, under, and by the laws of the State of Virginia, became the purchaser. See Record, pages 44, 45, 46, etc., Exhibit A.

That the sale of the said railroad property, and franchises, so made, by the master, was duly confirmed by this court and a decree of confirmation, of said sale, was passed, and entered, with a further decree, directing the said master to make, execute, and deliver, to the said purchaser, the Southern Railway Company, a deed, on the 22nd day of August, 1894, which deed was made, executed, and delivered, conveying the said Western North Carolina railroad, and all other property, of, and belonging to, the said Western North Carolina Railroad Company, including its franchises, to the said Southern Railway Company, on the said 22nd day of August, 1894. See pages 53, 54, 55, etc., and pages 98, 99, 100, etc., of the record, Exhibit A.

That, the said deed, so delivered, was admitted to probate; and, according to law, duly registered, on the 5th day of November, 1894; and is set out in full, in Exhibit A, already referred to, in this bill, beginning on page 98, of the said Exhibit A.

3. That, by virtue of this said decree, sale, confirmation, and deed of conveyance, all made in the due course of the court, and according to law, the said Southern Railway Company, as set out in the deed, because the sole owner of the said Western North Carolina railroad and all the property incident thereto, together with all the franchises of the company, the Western North Carolina Railroad Company, corporation, as aforesaid, subject to the lien of the first mortgage, as set out in this proceeding.

4. That, the Southern Railway Company, by reason of its purchase of this property and franchises, at the judicial sale of the same, made by the master, the officers of this court; and, in pursuance of its decree, the same set out, in the said Exhibit A, on pages 31, 32, 33, etc., of the same, having complied with every condition and requirement, attending the said sale, became a party to this suit, and this proceeding; and, as your orator is advised, is entitled to the protection of this court, in the use and enjoyment of the said
86 property and franchises, which it has been in possession of, solely, and enjoying the same, in its sole and own behalf, as owner; and operating the said railroad, under the franchises, so purchased, at the said sale, since the 24th day of August, 1894.

5. That, having treated with this honorable court, in the said purchase, the Southern Railway Company, duly accepted by the court, as purchaser, as appears on page 54, of Exhibit A, comes, and, together with your orator, The Central Trust Company, of New York, complainant, complains and says:

1. That, it is a corporation, originally created, organized, and existing, under the laws of the State of Virginia, and doing business in the State of North Carolina, at the present time, and was doing business in said State, at, from, and before, the commencement of this foreclosure suit, to and including the present time, and within the jurisdiction of the court, and brings this bill of complaint, together with The Central Trust Company of New York, complainant in the original bill, as supplemental thereto, in the above-entitled cause, and in aid of the relief granted in the same, and of the purposes, and ends contemplated in the same, against David R. Julian, high sheriff of the county of Rowan, a citizen thereof, within the western district of North Carolina, and within the jurisdiction of this court, your orator being a citizen of the State of Virginia, as aforesaid;—and thereupon, your orator, The Southern Railway Company, and the Central Trust Company of New York, further complain, and say:

2. That the matter in dispute, exceeds, exclusive of interest and cost, the sum and value of two thousand dollars, this bill being brought, for the purpose of securing, to your orator, The Southern Railway Company, the undisturbed possession, and enjoyment of its property, the Western North Carolina railroad and franchises, all within this district, and within the jurisdiction of this court, purchased by your orator, under the decree of this court, made and entered in this suit; this bill, being brought, also, to restrain, and enjoin, the said David R. Julian, sheriff, from casting a cloud upon your orator's title to the said property, the Western North Carolina railroad, and all the property incident thereto, including the
87 franchises, by a sale of the same, on the 7th day of October, 1901, in accordance with his notice of sale, which is as follows:

"*Execution Sale.*

"Sale of the Western North Carolina railroad under execution.

"By virtue of execution issuing from the superior court of Rowan county, North Carolina, one in favor of Cleyme James, adm'r'x of W. A. James for $15,000.00, interest and costs, and the other in favor of Fannie E. Howard, adm'r'- of Jno. H. A. Howard, for $5,000.00, interests and costs, upon judgments duly docketed in the superior court of said county of Rowan, reference hereby being had to the said judgments for a fuller description thereof, and by virtue of the levy made thereunder, the undersigned, as sheriff of Rowan county, State of North Carolina, will sell agreeably to the laws of the State in this behalf provided, at public auction to the highest bidder, at the court-house door in Salisbury, on Monday, the 7th day of October, A. D. 1901, at the hour of 12 m., all and singular

the corporate property of the defendant, The Western North Carolina railroad existing in the State of North Carolina, including its corporate franchises, rights, privileges, immunities, easements and appurtenances of every kind appertaining, belonging to, or in anywise connected therewith, or issuing out of and relating to the said The Western North Carolina railroad, together with all of its property in the State of North Carolina, and including its road-bed and right of way, its real estate acquired and owned for railroad purposes, its stations, depots, grounds, its railway tracks, switches, sidings, bridges, fences, turn-tables, water tanks, viaducts, culverts, superstructures, passenger, freight and other houses, machine shops, buildings and fixtures—the said railroad extending from the town of Salisbury through Statesville, Newton, Hickory, Morganton, Marion, Asheville to Paint Rock in Madison county, and from Asheville westward by way of Waynesville to Murphy in
88 Cherokee county—reference being had for a further description of said road and its property rights and franchises to the charter of the said road and the amendments thereto enacted from time to time by the General Assembly of North Carolina.

"This, the 4th day of Sept. 1901.

"D. R. JULIAN,
"*Sheriff of Rowan County.*"

The same printed in the Salisbury Daily Sun, a newspaper, published in the town of Salisbury, situated in the county of Rowan, aforesaid.

3. That the executions, referred to, in the aforesaid notice of sale, with the levies, made by the said sheriff, and under, and by reason of which, he is acting, were issued by the clerk of the superior court of Rowan county, upon the certain judgments of the said superior court, one, entitled, Mrs. Clemye James, administratrix, against The Western North Carolina Railroad Company, in the sum of fifteen thousand dollars; and, the other, entitled, Mrs. Fannie Howard, administratrix, against The Western North Carolina Railroad Company, in the sum of five thousand dollars. That both of the said judgments were given at the February, and March term, of the said superior court, of Rowan county, for the year 1898, and are so entered upon the judgment docket of the said court.

That the said judgments are set out in full, in the records of the actions, transcripts of which, true and perfect, and duly certified, being hereto attached, marked Exhibits B and C and made part of this bill.

3. That, as will appear, by reference to the said transcripts, on or about the 17th day of November, 1896, more than two years, after the Southern Railway Company purchased, and took possession of the Western North Carolina railroad, and franchises, under and by virtues of the decrees of this court, made, and entered, as aforesaid, and the deed of conveyance, executed, delivered, and registered as aforesaid, W. A. James, deceased, the intestate of Mrs. Clemye James, administratrix, and plaintiff, in the action of James, administratrix, against The Western North Carolina Railroad Company, and John

H. A. Howard, deceased, the intestate of Mrs. Fannie E. Howard, administratrix, and plaintiff, in the action of Howard, ad-
89 ministratrix, against The Western North Carolina Railroad Company, all of which, is set out, in the transcripts, B & C, hereto attached, were in the employment of the Southern Railway Company, your orator, as engineer and brakeman, operating and running an engine, between Salisbury and Asheville, points on the Western North Carolina railroad, which railroad constituted a part of the lines of railroad owned, and operated, in the State of North Carolina, by the Southern Railway Company, your orator. That, while so employed, as set out in the said transcripts, at a point on the mountain, between Round Knob, and Asheville, on or about the 17th of November, 1896, the said James, and Howard, deceased, and intestates, as aforesaid, were killed. That, at the time of their deaths, the Western North Carolina Railroad Company, had no interest or estate in the Western North Carolina railroad, or the franchises, nor had it had any interest or estate, in the said railroad or franchises, of any kind, or nature, whatsoever, since the 22nd day of August, 1894, the day the Southern Railway Company, your orator, took possession of the said railroad, and franchises, under and by reason of, the said purchase of the same, by your orator. That, the said James, and Howard, deceased, at the time of their deaths, were not in the employment of the Western North Carolina Railroad Company, nor, had they, or either one of them, at any time, ever been employed by the said Western North Carolina Railroad Company, or, by any agent, of the said company.

4. That, executions have been issued, to the said David R. Julian, sheriff, and respondent, upon these said judgments, in favor, of the said James and Howard, and levies made, under the same, which executions, and levies, are, in the words and figures, as follows:

"STATE OF NORTH CAROLINA,
"*Rowan County.*

"In the Superior Court.

"To the sheriff of Rowan county, Greeting:

"Whereas, judgment was rendered on the 21st day of February,
90 1898, in the superior court of Rowan county in an action between Clemye James, adm'r'x of W. A. James, plaintiff, and The Western North Carolina Railroad Company, defendant, in favor of the said Clemye James, adm'r'x of W. A. James, against the said defendant, The Western North Carolina Railroad Company, for the sum of $15,000 and costs as appears to us by the judgment-roll filed in the office of the clerk of the said county of Rowan; and whereas, the judgment was docketed in the said county of Rowan on the 21st day of February, 1898, and the sum of 15,000 is due thereon with interest on the said $15,000 from the 3rd day of May, 1897, until paid, and the further sum of $161.65 for costs and disbursements expended in the said suit whereof the said defendant, The Western North Carolina Railroad Company, is liable.

"You are therefore commanded as often before, to satisfy the said judgment out of the personal property of the said defendant within your county; or if sufficient personal property cannot be found, then out of the real property of the defendant and out of the corporate property, real and personal, of the said defendant, including its corporate franchises, corporate rights, privileges, powers, immunities, and all of the appurtenances belonging, or in anywise connected with or appertaining to it as a body corporate as owned and held by it on the day when the said judgment was so docketed in the said county of Rowan, or at any time thereafter in whose hands soever the same may be; and have you this execution together with the money before our said court at the court-house in Salisbury on the 11th Monday after the first Monday in September 1901, it being the 18th day of November, 1901, then and there to render the same to the said plaintiff. Witness W. G. Watson, clerk of our said court at office in Salisbury on the first Monday in September 1901.

"Issued this the 3rd day of September, 1901.

"W. G. WATSON,
"*Clerk Superior Court.*"

"The execution attached hereto was received by me this 3rd day of September, 1901. And in obedience to its mandate I fail to find any of the personal property of the defendant, The Western
91 North Carolina Railroad Company wherewith to satisfy the execution, I thereupon levied upon the corporate property and real estate of the said Western North Carolina Railroad Company, including its corporate rights, franchises, privileges, powers, immunities, appurtenances, owned by the said defendant on the date of the judgment and at the present time; and including all the property of the said defendant used for railroad purposes, its stations, depots, grounds, its railway tracks and rights of way, switches, sidings, bridges, fences, turn-tables, water tanks, culverts, superstructures, passenger, freight and other houses, machine shops, buildings and fixtures, embracing the railroad and its franchises extending from the town of Salisbury in Rowan county, through Statesville and Iredell county, through Newton and Hickory in Catawba county, through Morganton and Burke county, through Marion and McDowell county, through Asheville and Buncombe county, and through Marshall and Madison county to Paint Rock and also the railroad track and franchises from Asheville through Buncombe county and through Waynesville and Haywood county and on to the terminus at Murphy in Cherokee county. The property being all of the real estate, franchises, and property of the defendant in North Carolina.

"September 3rd, 1901.

"D. R. JULIAN,
"*Sheriff of Rowan County.*"

"STATE OF NORTH CAROLINA,
"*Rowan County.*

"In the Superior Court.

"To the sheriff of Rowan county, Greeting:

Whereas, judgment was rendered on the 21st day of February, 1898, in the superior court of Rowan county in an action between Fannie E. Howard, adm'x of Jno. H. A. Howard, and The Western North Carolina Railroad Company, defendant, in favor of the said Fannie E. Howard, adm'x of Jno. H. A. Howard, against the said defendant, The Western North Carolina Railroad Company
92 for the sum of $5,000 and costs as appears to us by the judgment-roll filed in the office of the clerk of the said county of Rowan; and whereas, the judgment was docketed in the said county of Rowan on the 21st day of February, 1898, and the sum of $5,000 is due thereon with interest on the said $5,000 from the 21st day of February, 1898, until paid and the further sum of $140.13 for costs and disbursements expended in the said suit whereof the said defendant, The Western North Carolina Railroad Company is liable:

You are therefore commanded as often before, to satisfy the said judgment out of the personal property of the said defendant within your county; or if sufficient personal property cannot be found, then out of the real property of the defendant and out of the corporate property, real and personal of the said defendant, including its corporate franchises, corporate rights, privileges, powers, immunities, and all its appurtenances belonging or in anywise connected with or appertaining to it as a body corporate as owned and held by it on the day when the said judgment was so docketed in the said county of Rowan, or at any time thereafter in whose hands soever the same may be; and have you this execution together with the money before our said court at the court-house in Salisbury on the 11th Monday after the first Monday in September, 1901, it being the 18th day of November, 1901, then and there to render the same to the said plaintiff.

"Witness W. G. Watson, clerk of our said court at office in Salisbury the first Monday in September, 1901.

"Issued this the 3rd day of November, 1901.

"W. G. WATSON,
"*Clerk Superior Court.*"

"The execution attached hereto was received by me this 3rd day of September, 1901. And in obedience to its mandate, I fail to find any personal property of the defendant, The Western North Carolina Railroad Company, wherewith to satisfy the execution; I thereupon levied upon the corporate property and real estate of the said Western North Carolina Railroad Co., including the corporate
93 rights, franchises, privileges, powers, immunities, appurtenances, owned by the said defendant on the date of the judgment and at the present time, and including all the property of the said defendant used for railroad purposes, its stations, depots, grounds, its railway tracks, and rights of way, switches, sidings, bridges, fences,

turn-tables, water tanks, culverts, superstructures, passenger, freight, and other houses, machine shops, buildings, and fixtures, embracing the railroad and its franchises extending from the town of Salisbury in Rowan county, through Statesville and Iredell county, through Newton and Hickory in Catawba county, through Morganton and Burke county, through Marion and McDowell county, through Asheville and Buncombe county, and through Marshall and Madison county to Paint Rock, and also the railroad track and franchises from Asheville through Buncombe county, and through Waynesville and Haywood county, and on the terminus at Murphy in Cherokee county. The property being all of the real estate, franchises and property of the defendant in North Carolina.

"September 3rd, 1901.

"D. R. JULIAN,
"*Sheriff of Rowan County.*"

5. That, after the said levies were made, by the said sheriff, he having made the same, without any authority in law, upon the property of your orator, The Southern Railway Company, as hereinbefore set out, the said respondent, David R. Julian, sheriff, caused to be published, as set out in the notice, copied in this bill, his purpose to "sell agreeable to the laws of the State, in this behalf, provided, at public auction," on Monday, the 7th day of October, 1901, all and singular the "corporate property of the Western North Carolina railroad," in the State of North Carolina, including its corporate franchises, rights, privileges, &c.

6. That, although requested not to do this thing, and informed, that he had advertised for sale, as hereinbefore set out, the property of the Southern Railway Company, to satisfy the executions against the Western North Carolina Railroad Company, now in his
94 hands, which property, that is to say, the Western North Carolina railroad, and the said franchises, being in no way connected with the Western North Carolina Railroad Company, your orator purchased and paid for, in accordance with the decrees of this honorable court, as set out in the record, marked Exhibit A, and although fully informed, that he had already, by reason of the said illegal levies, and notice of sale, of this property, done to your orator irreparable damage, and mischief, he, the said Julian, sheriff, without warrant, or authority, in law, persists in his determination to sell this property, at the time, and place aforesaid: and, the said respondent, as your orator, is informed, and believes, will, immediately after such sale, seize the said corporate real property, connected with the franchises aforesaid, all of the same, being the property of your orator, and deliver it to the purchaser, at such illegal and unwarranted sale.

7. That, in view of the matters and things, herein set forth, and by reason of the same, your orators, The Central Trust Company, of New York, complaining, in the original bill, in this suit, and The Southern Railway Company, a party to this petition, and supplemental bill, by permission of the court, have reason to fear, and do believe and fear, that the said respondent, David R. Julian, unless

restrained and enjoined, by this court, will proceed to sell the said property, and franchises, in accordance with the notice, published, as aforesaid, on the 7th day of October, instant, and will immediately seize, the said corporate, real property, and deliver the same, to the purchaser at the sale. That, in so doing, he, the said Julian, respondent, will deprive your orator of its use and occupation, and do unto your orators, great and irreparable damages, and injury. That the securities and bonds, issued by your orators, upon said property, to wit, the Western North Carolina railroad, and all property incident thereto, including the franchises, aforesaid, *constituting, as it does, a very* valuable part of the lines and system of the Southern Railway Company, the said securities and bonds, being in the hands of innocent and *bona fide* holders, will be greatly impaired, in value, by the sale and seizure of the said property, by the said Julian, sheriff.

That, there are other judgments against the said Western North Carolina Railroad corporation, similar to those of the said
95 James and Howard, and there are actions pending against the said Western North Carolina Railroad Company, also of a similar nature, in the superior courts of said counties in North Carolina, all in the western district of North Carolina, and within the jurisdiction of this court, the alleged causes of action, in all of which having arisen, years, after the sale of the said Western North Carolina railroad, and the franchises, and purchase of the same, by your orator, The Southern Railway Company.

That it is only in equity, and by injunction, that your orators can be afforded adequate and complete relief, against the vexatious conduct of this sheriff, and others, proceeding, as he is proceeding, and to prevent the irreparable mischief, which will be done your orators in the premises. That, to ask redress in a court of law, against trespassers, such as this respondent, will require, the prosecution of a multiplicity of suits, to avoid which, the jurisdiction of this court is invoked. That, it is only in this court, that your orator can have adequate, and complete relief, by injunction, which will prevent future litigation, by removing existing causes of controversy, as to the title of your orator, The Southern Railway Company, to the Western North Carolina railroad, and the franchises, purchased at the sale, under the decree of this court. That, as your orator is advised, this unwarranted, illegal action upon the part of this respondent, the said David R. Julian, has cast upon the title of your orator, to the said property, a cloud, and to remove it, as well as to protect your orator, in the enjoyment of property purchased from this court, and to avoid a multiplicity of suits, as pointed out in the bill, your orator prays:

1. That this honorable court enter a decree, that a writ of injunction, conformable to the prayer of this bill, be issued to the respondent, David R. Julian, sheriff, of Rowan county, enjoining him, from proceeding any further, with the sale, advertised, for the 7th of October, of the property and franchises mentioned in the bill, until the further order of this court.

2. That, not only a writ of injunction, conformable to the prayer

of this bill, be issued, but also, a writ of subpœna, and notice, directed, to the said David R. Julian, commanding him, on a
96 certain day, to appear and answer, unto this bill of complaint, and to abide and perform such order, and decree in the premises, as to the court, shall seem proper, and required by the principles of equity and good conscience.

3. That, if, in anything your orators and petitioners, are mistaken, in their relief, then they pray for such other and further relief as the premises may warrant, and the rules of equity, allow.

CENTRAL TRUST COMPANY OF NEW YORK AND SOUTHERN RAILWAY COMPANY,
By CHAS. PRICE, *Solicitor.*

UNITED STATES OF AMERICA, }
Western District of North Carolina. }

This day comes Charles Price, who makes oath, that he is the agent and attorney of the petitioners, and complainants, and that the matters alleged in this petition, and bill, are true, except as to those stated on information and belief, and those he believes to be true.

CHAS. PRICE.

Sworn to, and subscribed before me, this 5th day of October, 1901.

W. G. WATSON,
[SEAL.] *Clerk Superior Court, Rowan County.*

United States Circuit Court, Western District of North Carolina.

IN THE MATTER OF THE SUIT OF THE CENTRAL TRUST COMPANY of New York
against
THE WESTERN NORTH CAROLINA RAILROAD COMPANY ET AL.

Order.

On reading the petition, and bill, supplemental, filed by leave of the court, in the above-entitled suit, and the exhibit, filed as
97 a part thereof, it is ordered, that the suit, as entitled above, depending in the circuit court of the United States, for the western district of North Carolina, be advanced and placed upon the docket, at Statesville, N. C., within said district, and that the complainant's and petitioner's bill and petition for restraining order, pursuant to the prayer of the petition, and bill be set down for hearing at 12 o'clock m., before me, at Statesville, North Carolina, on Monday, the 21st day of October, 1901, or as soon thereafter as counsel can be heard.

This being a proper case for granting a temporary restraining order, it is ordered and decreed, that, until the hearing of such petition, and bill for injunction, and the further order of the court, thereon, the respondent, the said David R. Julian, sheriff, as set out

in the bill, is restrained and prohibited from proceeding any further, with the sale of the property, advertised for sale, on the 7th day of October, 1901, as set out in the bill, or in any manner interfering with the said property, or franchise, so advertised. It is further ordered, that a copy of this order be served on the said Julian, sheriff, by delivering the same to him, together with a copy of the bill.

It is further ordered, that a subpœna issue to the said respondent, as prayed for, in the bill.

JAS. E. BOYD,
U. S. Judge.

October 5th, 1901.

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"EXHIBIT B."

NORTH CAROLINA, *Rowan County.*

In the Superior Court.

MRS. CLEMYE JAMES, Administrator of W. A. James, *against* THE WESTERN NORTH CAROLINA RAILROAD COMPANY.

Summons for Relief.

State of North Carolina to the sheriff of Burke county, Greeting:

You are hereby commanded to summon The Western North Carolina Railroad Company, the defendant above named, if it be found within your county, to be and appear before the judge of our superior court, at a court to be held for the county of Rowan at the court-house in Salisbury, on the 2nd Monday before the 1st Monday in March, 1897, and answer the complaint which will be deposited in the office of the clerk of the superior court of said county within the first three days of the term, and let the said defendant take notice that if it fail to answer the said complaint within that term, the plaintiff will apply to the court for the relief demanded in the complaint, and the cost of this action to be taxed by the clerk.

Herein fail not, and of this summons make due return.

Given under my hand and seal of said court, this 30th day of January, 1897.

[SEAL.]

W. G. WATSON,
Clerk Superior Court of Rowan County.

We acknowledge ourselves bound unto The Western North Carolina Railroad, the defendant in this action, in the sum of two hundred dollars, to be void, however, if the plaintiff Mrs.
99 Clemye James, shall pay to the defendant all such costs as the defendant may recover of the plaintiff in this action.

Witness our hands and seals, this 3rd day of January, 1897.

MRS. CLEMYE JAMES, *Adm'r.* [SEAL.]
T. D. ROSEMAN. [SEAL.]
MRS. CLEMYE JAMES. [SEAL.]

Returnable to February term, 1897, of the superior court of Rowan county.

Received February 3rd, 1897. Served by delivering a copy of the within summons to Geo. P. Erwin, secretary and treasurer of the defendant company, this 4th day of February, 1897.

Fee paid 60 cents.

THOMAS M. WEBB,
Sheriff Burke County.

NORTH CAROLINA, }
Rowan County. }

In the Superior Court.

MRS. CLEMYE JAMES, Administrator of W. A. James, }
against }
THE WESTERN NORTH CAROLINA RAILROAD COMPANY. }

Summons for Relief.

State of North Carolina to the sheriff of Wake county, Greeting:

You are hereby commanded, to summon The Western North Carolina Railroad Company, the defendant above named, if it be found within your county, to be and appear before the judge of our superior court, at a court to be held for the county of Rowan at the court-house in Salisbury, on the 2nd Monday before 1st Monday in March, 1897, and answer the complaint which will be deposited in the office of the clerk of the superior court of said county within the first three days of the term, and let the said defendant take notice that if it fail to answer the said complaint within that term,
100 the plaintiff will apply to the court for the relief demanded in the complaint, and the cost of this action to be taxed by the clerk.

Herein fail not, and of this summons make due return.

Given under my hand and seal of said court, this 30th day of January, 1897.

[SEAL.]

W. G. WATSON,
Clerk Superior Court of Rowan County.

Returnable to February term, 1897, of the superior court of Rowan county.

Received February 1st, 1897. Served by delivering a copy of the within summons to A. B. Andrews, president of the defendan- company, this the 1st day of February, 1897.

Fee 60 cents paid.

HAM T. JONES,
Sheriff Wake County.

NORTH CAROLINA,
Rowan County.

In the Superior Court, February Term, 1897.

MRS. CLEMYE JAMES, Administrator of William A. James,
against
THE WESTERN NORTH CAROLINA RAILROAD COMPANY.

Complaint.

The plaintiff complains and alleges:

I. That the defendant, The Western North Carolina Railroad Company, is a corporation, chartered by and organized under the laws of the State of North Carolina, and is and was on the 17th day of November, 1896, authorized and empowered to transport passengers and freight over the lines of railway, constructed under its charter from Salisbury in the county of Rowan to Paint Rock at the line of the State of Tennessee and from Asheville in Buncombe county to Murphy in Cherokee county, in the State of North Carolina, and as such common carrier, it was the duty of the said,
101 The Western North Carolina Railroad Company, to use ordinary care and diligence to protect its servants engaged in operating said lines from danger.

II. That the said, The Western — Railroad Company, was not empowered by law to relieve itself of the duty of exercising proper care for the protection of the servants employed in running trains over its said road, of liability for negligence in running such trains by leasing its franchise and property to another corporation.

III. That on the 30th day of April, 1886, as plaintiff is informed and believes, the said, The Western North Carolina Railroad Company, attempted to execute a lease to another corporation chartered under the laws of Virginia, and is for the purpose of this action estopped from denying that it did lease itself, its franchises and property to the said Richmond and Danville Railroad Company, and that the term of said lease has not expired and had not expired on the said 17th day of November, A. D. 1886, and that the said, The Richmond and Danville Railroad Company, was placed in possession of the said lines of railroad theretofore constructed between the points hereinbefore mentioned, and continued to operate said lines, as lessee, until about the — day of ——, 1893, when the franchise and property was placed, by order of the circuit court of the western district of North Carolina, in the hands of a receiver.

IV. That the Southern Railway Company is a corporation organized under the laws of the State of Virginia and authorized by charter to succeed to the rights and powers of the said, The Richmond and Danville Railroad Company, and operate other lines of railroad.

V. That as assignee of The Richmond and Danville Railroad Company, the said Southern Railway Company acquired control of the franchise and property of the Western North Carolina Railroad

Company and, as such, has been holding itself out as a carrier of freight and passengers over said lines of the Western North Carolina Railroad Company between Salisbury and Paint Rock and Asheville and Murphy, as aforesaid and the said, The West-
102 ern North Carolina Railroad Company is estopped to deny, that as successor or assignee the said Southern Railway Company sustains the relation of lessee to lessor.

V½. That the Southern Railway Company acquired possession and control of the Western North Carolina railroad, and the franchise of property of the Western North Carolina Railroad Company before and had such possession on said 17th day of November, 1896, with the consent of the Western North Carolina Railroad Company, but without authority of law and the defendant is responsible for any failure on the part of said Southern Railway Company to discharge the duties devolving upon it as the operator ef said road.

VI. That on said 17th day of November 1896, the plaintiff's intestate, William A. James, was a locomotive engineer employed by the said Southern Railway Company and in that capacity was running an engine over the said line from Salisbury to Paint Rock, when as plaintiff is informed and believes, the said, William A. James, was by the negligence of the Southern Railway Company, killed in a collision of the engine which was being run by said James with another engine which at the time was being run under the orders and direction of the said Southern Railway Company, and had been engaged as a helping engine in assisting to move a train over the heavy grade from the eastern base to the top of the Blue Ridge mountain-, on said line, and was returning down said grade with tender in front, when said collision occurred.

VII. That it was the duty of said Southern Railway Company to have had a light on the rear of said tender, the said company negligently and willfully failed to *prove* such light and the said collision and injury to plaintiff's intestate was caused by the failure to provide and place such light on said helping engine as aforesaid in order to warn engines coming from the opposite direction of its approach.

VIII. That it had been the invariable custom of said Southern Railway Company, prior to said 17th day of November 1896, and of the Richmond and Danville Railroad Company, to which it succeeded, to provide and place in rear of such helping
103 engine, while being run down said grade, a light to warn those in danger of train- or engines running from an opposite direction of the danger and enable them to guard against it.

IX. That on or about the same day, when the accident occurred, and previous to the collision, the said Southern Railway Company had ordered that an engine, provided with a light for the rear of the tender as as aforesaid and which had theretofore been used as a helping engine be removed and had negligenily failed to provide in its stead another engine with such equipment, as the plaintiff's intestate had reasonable grounds to believe that the said company would do.

X. That on said 17th day of November, 1896, by reason of a con-

tract theretofore entered into by the said Southern Railway Company with intestate and others, it was the duty of said Southern Railway Company to place a conductor on said helping engine and that the said company negligently omitted and failed to discharge this duty, though the said accident or injury, as plaintiff is informed and believes, could have been avoided by proper care and watchfulness of such conductor, had he been placed thereon.

XI. That it was the *the* duty of said Southern Railway Company not only to furnish competent engineers to run such helping engine but to furnish a sufficient number to perform that service without danger to its other employees or passengers, and that the said Southern Railway Company negligently refused, though often urged to do so, to provide another engineer to relieve one Terrell, who was in charge of said helping engine, and by reason of such omission and refusal to provide such assistance, said Terrell had been compelled to run his engine almost incessantly for from about twenty-four to forty-eight hours so as to completely exhaust him and render him unable to be duly watchful to avert danger, and that but for the fact, that the said Southern Railway Company had compelled said Terrell so to perform labor, which it was beyond the capacity of any human being to perform properly, the said accident and injury might have been avoided by him.

XII. That the said W. A. James, plaintiff's intestate, was
104 earning one hundred and twenty-five dollars per month, was a man of good habits, was about thirty-five years old and had an expectancy of life for 31.8 years.

XIII. That plaintiff has been appointed administrator of the said W. A. James and has qualified and entered upon the discharge of her duties.

Wherefore plaintiff demands judgment against the defendant for the sum of thirty-seven thousand ($37,000) dollars together with costs of this action.

A. C. AVERY,
B. F. LONG,
LEE S. OVERMAN,
Attorneys for Plaintiff.

Clemye James, being duly sworn according to law says that the foregoing complaint is true of her own knowledge except as to matters stated upon information and belief and as to those matters she believes it to be true.

MRS. CLEMYE JAMES.

Sworn to and subscribed before me this the 10th of March, 1897.

[SEAL.] J. L. CATHEY, *C. S. C.*

Filed 20th of March, 1897.

W. G. WATSON, *C. S. C.*

NORTH CAROLINA, *Rowan County.*

Superior Court, February Term, 1897.

MRS. CLEMYE JAMES, Administratrix of William A. James,
vs.
THE WESTERN NORTH CAROLINA RAILROAD COMPANY.

Answer.

The defendant, answering the complaint of the plaintiff, says:

I. That, the allegations contained in the first paragraph are not true, as therein stated, and are denied. The defendant admits that the Western North Carolina Railroad Company was a corporation chartered by, and organized under the laws of the State of North Carolina. It denies that such corporation was on the 17th day of November, 1896, authorized and empowered to transport passengers and freight over any line of railroad, or that it had any servants engaged in operating the line mentioned and described in said paragraph one, or that it owed any duty to such servants. It avers that on the 17th day of November, 1896, the Southern Railway Company was in possession of the said Western North Carolina railroad, as the owner thereof, by virtue of its purchase, as hereinafter set out, and that the Western North Carolina Railroad Company had absolutely nothing to do with the operation of the said line of railroad, and was in no manner liable for any of the acts of the Southern Railway Company, or for any torts committed by it.

II. That, as defendant is informed and believes, the allegations contained in the second paragraph of the plaintiff's complaint, are not true, and are denied. For a further answer to said second paragraph, the defendant denies that it ever attempted to relieve itself of any duty it owed to servants or others, by leasing its franchises and property to another corporation. The defendant avers, however, that it was so relieved by the sale of its franchise and property, as hereinafter set out.

III. That, as defendant is informed and believes, the allegations contained in the third paragraph are true, except so much thereof as alleges that the lease of the Western North Carolina railroad to the Richmond and Danville Railroad Company has not, and had not, expired, on the 17th day of November, 1896. The same is not true, and is denied.

IV. That as defendant is informed and believes, the allegations contained in the fourth paragraph of the plaintiff's complaint are true; so far as they go; but if by said allegation it is meant to be averred that the Southern Railway Company was authorized by its charter to succeed to the rights and powers of the said Richmond and Danville Railroad Company only, then the said allegations are not true. Defendant avers the fact to be that the said Southern

Railway Company had the right to purchase, absolutely,
106 other railroads, and did purchase the said Western North Carolina railroad, and was in possession of the same on the 17th day of November, 1896, as such purchaser, claiming same as owner thereof, by virtue of said purchase, and the said line is still claimed by the said Southern Railway Company.

V. That, as defendant is informed and believes, the allegations contained in the fifth paragraph are not true, and are denied, and defendant alleges, further that the relation of lessor and lessee, never existed between the Southern Railway Company and the Western North Carolina Railroad Company.

V½. (Amended by leave of the court as to the interlineations.) That the allegations contained in paragraph 5½ are not true and are denied.

VI. That, as defendant is informed and believes, the allegations contained in the sixth paragraph of the plaintiff's complaint are not true, and are denied, except so much thereof as alleges that William A. James was an engineer in the employment of the Southern Railway Company, and was killed in a collision on said railway.

VII. That, as defendant is informed and believes, the allegations contained in the seventh paragraph are not true, and are denied.

VIII. That, as defendant is informed and believes, the allegations contained in the eighth paragraph of the plaintiff's complaint are not true and are denied.

IX. That, as defendant is informed and believes, the allegations contained in the ninth paragraph are not true, and are denied.

X. That, as defendant is informed and believes, the allegations contained in the tenth paragraph of the plaintiff's complaint, are not true, and are denied.

XI. That, as defendant is informed and believes, the allegations contained in the eleventh paragraph are not true, and are denied.

XII. That defendant has no knowledge or information sufficient to enable it to form a belief as to the truth of the allega-
107 tions contained in the twelfth paragraph of the plaintiff's complaint, and it therefore denies the same.

XIII. That defendant has no knowledge or information sufficient upon which to form a belief as to the truth of the allegations contained in the thirteenth paragraph, and it therefore denies the same.

For further answer to said complaint, the defendant says:

(1.) That, as defendant is informed and believes, the plaintiff's intestate contributed by his own negligence to his injury by disregarding orders given him in the management of his engine and train.

(2.) That, as defendant is informed and believes, the death of the plaintiff's intestate was caused by the negligence of a servant of the said Southern Railway Company, to wit; one W. P. Terrell, who was a fellow-servant of the plaintiff's intestate, in the same common employment of the Southern Railway Company with said intestate.

(3.) That on the — day of —— The Central Trust Company of New York, a corporation duly created by and under the laws of the State of New York, filed its bill in the circuit court of the United States for the western district of North Carolina, against said Western North Carolina Railroad Company, and The Richmond and Danville Railroad Company to foreclose a mortgage theretofore executed to the said The Central Trust Company of New York, by the said Western North Carolina Railroad Company, to secure a large amount of bonds, to wit: in the sum of about four million dollars, and to sell all the interest the Richmond & Danville Railroad Company might have in said Western North Carolina railroad. That in said suit an order of sale was made by the said circuit court of the United States, by which a certain master or commissioner appointed in said order, was required to sell all the property, rights, franchises and privileges, of the said Western North Carolina Railroad Company, at public auction. That under said order, a sale of all the said property, rights, franchises, and privileges, of the said Western North Carolina Railroad Company, was had, at the depot of the said Western North Carolina Railroad Company, at
108 Statesville, North Carolina, by the said master or commissioners, when and where the Southern Railway Company, a corporation duly created by and under the laws of the State of Virginia, and having power and authority under its charter to purchase railroads and operate the same, became the purchaser of the said property, rights, franchises, and privileges, of the said Western North Carolina Railroad. That said sale was duly reported by the said master or commissioner of the court, and there was a decree of said court confirming said sale, and requiring the said master or commissioner to execute a deed to the said purchaser, the Southern Railway Company, conveying to the Southern Railway Company all the property, rights, franchises, and privileges, of the said Western North Carolina Railroad Company. That such deed was executed by said master or commissioner, and delivered to the said Southern Railway Company, and the same was duly registered as required by law. That after the execution of said deed, the said Southern Railway Company took possession of the property, rights, franchises, and privileges of the said Western North Carolina Railroad Company, and has since that time constantly operated the said railroad, and been in continual exercise of the rights and privileges granted to the said Western North Carolina Railroad Company by its charter, and the said Southern Railway Company is still in possession of the same. That the said Western North Carolina Railroad Company was by said sale and the execution of the said deed, *ipso facto* dissolved as a railroad corporation authorized and empowered to operate its railroad, and since said sale and the execution of said deed, it has never been responsible for any of the acts of said purchaser, the Southern Railway Company, or for any torts committed by it.

Wherefore having fully answered, the defendant demands that it be hence dismissed with its costs.

PRICE & BASON,
Attorneys for Defendant.

NORTH CAROLINA, }
Wake County. }

A. B. Andrews, being duly sworn, says that he is an officer of the defendant corporation, to wit: that he is president thereof.
109 That he has read the foregoing answer, and that the same is true as of his own knowledge, except as — those matters and things therein stated as upon information and belief, and as to those he believes it to be true.

A. B. ANDREWS.

Sworn to and subscribed before me this 1st day of May, 1897.
[NOTARIAL SEAL.]
H. A. MILLER,
Notary Public.

Filed 3rd day of May, 1897.

W. G. WATSON, *C. S. C.*

NORTH CAROLINA, }
Rowan County. }

Superior Court, February Term, 1897.

MRS. CLEMYE JAMES, Administratrix of William A. James, }
vs.
THE WESTERN NORTH CAROLINA RAILROAD COMPANY. }

Reply.

Replying to the new matter contained in sections one, two, and four of defendant's answer, the plaintiff says:

I. That it is not true, as alleged in the first section of the defendant's answer, that the Southern Railway Company was on the 17th day of November 1896, or at any time since said day the owner of the Western North Carolina railroad or in possession of said railroad as its owner; but the plaintiff avers on the contrary that the said Southern Railway Company is and was a foreign corporation created and organized under the laws of the State of Virginia and had not then or now power or authority to purchase or hold as owner thereof the franchise and property of the defendant, The Western North Carolina Railroad Company, and that any pretended purchase by virtue of a decree of any court was either ineffectual to pass the said franchise and property of the defendant to or vest the same in the said Southern Railway Company.

II. That it is not true, as alleged in the second section of
110 the defendant's answer, that it did not attempt to relieve itself of the duty it owed to the State of North Carolina as a carrier of freights and passengers by allowing the use of its franchise and property to be unlawfully turned over to the said Southern Railway Company; but on the contrary plaintiff avers that on the 30th day of April 1886 the defendant company executed and delivered to the Richmond and Danville Railroad Company, hereinbefore mentioned, a paper-writing purporting to be a lease and

devise of the franchise and property of the defendant company to the said Richmond and Danville Railroad Company for the term of 99 years when the defendant company had no power or authority granted to it in its charter to so lease and demise its said franchise and property to the said Richmond and Danville Railroad Company.

The plaintiff avers that though the said pretended lease was *ultra vires* on the part of the lessor therein named the said Richmond and Danville Railroad Company took charge of the said railroad and operated it as a carrier of freights and passengers, claiming under and is estopped from denying that the relation of lessor and lessee existed between it and the defendant company, after holding itself out to the public. And plaintiff further avers that the said Southern Railway Company has not by its pretended purchase acquired the title to and become the owner of the franchise and property of the defendant company; but the said Southern Railway Company took possession of said franchise and property by virtue of a decree permitting it as the purchaser to elect whether it would operate the said Western North Carolina railroad under a claim of ownership or as lessee, as plaintiff is informed and believes, and having given no notice of the exercise of its right of election it is estopped from denying and the defendant company being a party to said suit wherein said decree was entered is also estopped from denying that the said Southern Railway Company is now operating the defendant's road as its lessee.

And the plaintiff is further advised, informed, and believes that the defendant company consented that its franchise and property should be turned over to the said Southern Railway Company and that its lines of road should be operated by the said Southern Railway Company as aforesaid, and that the said Southern Railway Company has no power or authority to purchase and hold the franchise and property of the defendant company as owner thereof or as lessee for 99 years or as assignee or purchaser of the pretended leasehold interest of the said Richmond and Danville Railroad Company and that the defendant company had no power or authority to execute said lease; but that the defendant company could not rid itself of its implied obligation to the State to see that ordinary care is exercised in furnishing safe machinery and appliances and a sufficient number of servants so as to protect servants and employees engaged in operating said road from injury. And this plaintiff is advised that the defendant company is still answerable for the negligence of any other person, which, through its constituted authorities, it permits to operate its road as a carrier of freights and passengers though without authority of law.

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III. That it is not true, as alleged in the fourth section of the defendant's answer, that the Southern Railway Company had the right to purchase or did in fact purchase absolutely the franchise and property of the defendant company; but it is admitted that the said Southern Railway Company was on the 17th day of November, 1896, in possession of the franchise, property and road-bed of the de-

fendant company and had taken possession of and was operating its lines of railway with the consent of the defendant company.

Further replying to the defendant's answer, by way of new matter, the plaintiff says:

1. That she has no knowledge or information sufficient to form a belief as to any orders given to her intestate, W. A. James, as to the management of his engine and train, or of any disregard of the properly constituted authorities by said intestate, and plaintiff is advised that the defence of contributory negligence is not sufficiently alleged in the first section of defendant's answer by way of new matter to enable her to understand and prepare to meet any specific allegation of negligence on the part of her said intestate, but if the court shall permit testimony to be offered in support of the plaintiff's vague allegation, plaintiff asks that — be held to strict proof.

2. That as plaintiff is advised she is not required to answer
112 the indefinite allegation of negligence on the part of the fellow-servant of her intestate, one W. P. Terrell, because the said allegations are not sufficiently specific to enable her to prepare to meet them. As plaintiff is informed and believes the death of her intestate was caused by the negligence of the defendant or of the Southern Railway Company while operating its road as its lessee or by its consent but without authority of law and she denies that the proximate cause of his injury and death was the negligence of any person other than the Southern Railway Company and that the defendant company is answerable for such negligence on the part of the Southern Railway Company.

Further replying to the new matter contained in the defendant's answer contained in the third section of said answer by way of new matter, the plaintiff says:

First. That she has no knowledge or information sufficient to form a belief as to whether the Central Trust Company of New York is a corporation duly created and organized under the laws of the State of New York, but she admits that a bill was filed by said company. That she has no knowledge or information sufficient to form a belief as to whether a mortgage was issued to said company or as to whether such mortgage was executed to secure the sum of money or bonds mentioned in said section, or as to whether such *bona fide* debt existed and plaintiff therefore denies the allegation that a mortgage was executed to secure the amount of bonds therein mentioned.

Second. That the plaintiff admits that in a suit brought by the Central Trust Company of New York, a decree was entered appointing a master or commissioner to sell the franchise and property of the defendant company at public auction, but avers that, as she is informed and belives, the said decree required that the said sale should be made subject to a first mortgage, the franchise and property of the defendant company which was then and is still outstanding and unsatisfied, and further that under the terms of said decree the purchaser at any sale made by virtue of it was to be allowed the privilege of operating said road at the option of said purchaser as the lessee of the defendant company or the purchaser

of the unexpired term of the said lease to the Richmond and Danville Railroad Company.

Third. The plaintiff has no information or knowledge sufficient to form a belief as to whether a sale was made in pursuance of said decree, or whether the Southern Railway Company was declared the purchaser.

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Fourth. That is not true, as plaintiff is informed and believes, that the Southern Railway Company had the power and authority under its charter or under the laws of North Carolina to purchase and hold the franchise and property of the defendant company or to acquire a leasehold interest in said franchise and property for the term of 99 years.

Fifth. That as plaintiff is informed and believes a report of sale was made and an order was made confirming said sale, but the pretended purchaser at said sale was, by the terms of the said decree of sale, *was* to hold subject to a first mortgage as aforesaid and was to be allowed at the option of such purchaser to operate the lines of railroad purporting to be sold as lessee. That this plaintiff has no information or knowledge sufficient to form a belief as to whether any deed purporting to convey said franchise or property has or has not been duly registered as required by law.

Sixth. That it is true that the Southern Railway Company has been operating lines of railway belonging to the defendant company since some time prior to the said 17th day of November, 1896, but the plaintiff denies that the said Southern Railway Company is either the absolute owner of the franchise and property of the defendant or is in the lawful possession of the same as lessee.

Seventh. That it is not true that the Western North Carolina Railroad Company has been, by virtue of any sale, or the execution of any deed dissolved as a railroad corporation, but on the contrary plaintiff is informed and believes and so avers that the decree under which it is claimed in the answer the sale was made recognized the continued existence of the defendant company by ordering that any sale made by virtue of it should be subject to a first mortgage of the franchise and property of the defendant company which is still outstanding and unsatisfied and which cannot be foreclosed without the presence, as a party, to a suit for foreclosure, of the defendant company as a corporation, and that said decree purports only to authorize a sale of the equity of redemption by reason of a default in the payment of the interest on certain second-mortgage bonds therein mentioned. And the president of said company admits on oath in the verification to said answer that he is still an officer and the president of the defendant company, an existing corporation.

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LEE S. OVERMAN,
B. F. LONG, AND
A. C. AVERY,
Attorneys.

Mrs. Clemye James being duly sworn says that the facts set forth in the foregoing reply as of her own knowledge are true and the

facts set forth therein upon information and belief she believes to be true.

MRS. CLEEYE JAMES.

Sworn to and subscribed before me this 8th day of May, 1897.
W. G. WATSON, *C. S. C.*

Filed May 8th, 1897.

W. G. WATSON, *C. S. C.*

ROWAN COUNTY:

In the Superior Court.

CLEMYE JAMES, Administratrix — W. A. James, Deceased, Plaintiff,
against
THE WESTERN NORTH CAROLINA RAILROAD COMPANY, Defendant.
} Judgment for Plaintiff.

At a superior court, held at the court-house in Salisbury, Rowan county, on the 21st day of February, 1898.

Present: Hon. Jas. D. McIver, judge.

This action having been called for further proceeding, and it, appearing to the court, that the judgment of the superior court, heretofore rendered, in the above-entitled action, was reversed by the supreme court, and judgment allowed to be entered in this court in accordance with the order of the supreme court.

It is now, on motion of counsel for plaintiff, adjudged, that the plaintiff recover of the defendant the sum of fifteen thousand
115 dollars the damages assessed by the jury, in favor of the plaintiff, with interest on the same, from the 3rd day of May, 1897, until paid, and for costs of the action, including costs in defendant's appeal, the same to be taxed by the clerk of this court.

JAMES D. McIVER,
Judge Presiding.

STATE OF NORTH CAROLINA,
Rowan County.

I, W. G. Watson, clerk superior court for said county of Rowan, do hereby certify the foregoing to be true copies, as filed in my office, of the summons, complaint, answer, reply and judgment in the suit of Mrs. Clemye James, administrator of W. A. James, *vs.* The Western North Carolina Railroad Company.

Witness my hand and the seal of the said court at office in Salisbury, the 7th day of October, 1901.

[SEAL.]

W. G. WATSON,
Clerk Superior Court.

116 "EXHIBIT C."

ROWAN COUNTY:

In the Superior Court.

MRS. FANNIE E. HOWARD, Administrator of John H. A. Howard,
against
THE WESTERN NORTH CAROLINA RAILROAD COMPANY.

Summons for Relief.

The State of North Carolina to the sheriff of Burke county, Greeting:

You are hereby commanded to summon The Western North Carolina Railroad Company, the defendant above named, if it be found within your county, to be and appear before the judge of our superior court, at a court to be held for the county of Rowan at the court-house in Salisbury, on the 2nd Monday before the 1st Monday of March, 1897, and answer the complaint, which will be deposited in the office of the clerk of the superior court of said county, within the first three days of said term; and let the said defendant take notice that if it fail to answer the said complaint within that term, the plaintiff will apply to the court for the relief demanded in the complaint and the costs of this action, to be taxed by the clerk.

Hereof fail not, and of this summons make due return.

Given under my hand and seal of said court, this 30th day of January, 1897.

[SEAL.]

W. G. WATSON,
Clerk Superior Court.

We acknowledge ourselves bound unto The Western North Carolina Railroad Company, the defendant in this action, in the sum of two hundred dollars, to be void, however, if the plaintiff Fannie E. Howard, administrator — John H. A. Howard shall pay to
117 the defendant all such costs as the defendant may recover of the plaintiff in this action.

Witness our hands and seals, this 30 day of January, 1897.

FANNIE E. HOWARD,
Adm'r of John H. A. Howard.
FANNIE E. HOWARD. [SEAL.]

Returnable to February term, 1897, of the superior court for Rowan county.

Received February 3rd, 1897. Served by delivering a copy of the within summons to Geo. P. Erwin, secretary and treasurer of the defendant company, this the 4th day of February, 1897.

Mileage fee paid, 60 cents.

THOMAS M. WEBB,
Sheriff Burke County.

NORTH CAROLINA, }
Rowan County. }

In the Superior Court.

MRS. FANNIE E. HOWARD, Administrator of John H. A. Howard, }
against
THE WESTERN NORTH CAROLINA RAILROAD COMPANY. }

Summons for Relief.

State of North Carolina to the sheriff of Wake county, Greeting:

You are hereby commanded to summon The Western North Carolina Railroad Company, the defendant above named, if it be found within your county, to be and appear before the judge of our superior court, at a court to be held for the county of Rowan at the court-house in Salisbury, on the 3rd Monday before 1st Monday in March, 1897, and answer the complaint which will be deposited in the office of the clerk of the superior court of said county within the first three days of the term, and let the said defendant take notice that if it fails to answer the said complaint within that
118 term, the plaintiff will apply to the court for the relief demanded in the complaint, and the cost of this action to be taxed by the clerk.

Herein fail not, and of this summons make due return.

Given under my hand and seal of said court, this 30th day of January, 1897.

W. G. WATSON,
[SEAL.] *Clerk Superior Court of Rowan County.*

Returnable to February term, 1897, of the superior court of Rowan county.

Received February 1st, 1897. Served February 2, 1897, by delivering a copy of the within summons to A. B. Andrews, president of the defendant company.

Fee 50 cent- paid.

HAM T. JONES,
Sheriff Wake County.

NORTH CAROLINA, }
Rowan County. }

In the Superior Court, February Term, 1897.

MRS. FANNIE E. HOWARD, Administrator of John H. A. Howard, }
against } Complaint.
THE WESTERN NORTH CAROLINA RAILROAD COMPANY. }

The plaintiff complains and alleges:

I. That the defendant, The Western North Carolina Railroad Company, is a corporation, chartered by and organized under the laws of the State of North Carolina, and is and was on the 17th day

of November, 1896, authorized and empowered to transport passengers and freight over the lines of railway constructed under its charter from Salisbury in the county of Rowan to Paint Rock at the line of the State of Tennessee and from Asheville in Buncombe county to Murphy in Cherokee county, in the State of North Carolina, and as such common carrier, it was the duty of the said, The Western North Carolina Railroad Company, to use ordinary
119 care and diligence to protect its servants engaged in operating said lines from danger.

II. That the said, The Western North Carolina Railroad Company, was not empowered by law to relieve itself of the duty of exercising proper care for the protection of its servants employed in running trains over its said road or of liability for negligence in running such trains by leasing its franchise and property to another corporation.

—. That, on the 30th day of April, 1886, as plaintiff is informed and believes, the said, The Western North Carolina Railroad Company, attempted to execute a lease to another corporation chartered under the laws of Virginia, and is for the purpose of this action estopped from denying that it did lease itself, its franchise and property to the said Richmond and Danville Railroad Company, and that the terms of said lease has not expired and had not expired on the said 17th day of November 1896, and that the said, The Richmond and Danville Railroad Company was placed in possession of the said lines of railroad theretofore constructed between the points hereinbefore mentioned, and continued to operate said lines, as lessee, until about the — day of ——, 1893 when the franchise and property was placed, by order of the circuit court of the western district of North Carolina, in the hands of a receiver.

IV. That the Southern Railway Company is a corporation organized under the laws of the State of Virginia and authorized by charter to succeed to the rights and powers of the said, The Richmond and Danville Railroad Company and operate other lines of railroad.

V. That as assignee of the Richmond and Danville Railroad Company, the said Southern Railway Company acquired control of the franchise and property of the Western North Carolina Railroad Company and, as such, has been holding itself out as a carrier of freight and passengers over said lines of the Western North Carolina Railroad Company between Salisbury and Paint Rock and Asheville and Murphy, as aforesaid, and the said, The Western North Carolina Railroad Company is estopped to deny, that as successor or assignee, the said Southern Railway Company sustains the relation of lessee to lessor.

VI. That on said 17th day of November 1896, the plaintiff's
120 intestate, John H. A. Howard, was a fireman employed by the said Southern Railway Company, was firing on an engine running over the said line from Salisbury to Paint Rock, when, as plaintiff is informed and believes, the said, John H. A. Howard, was, by the negligence of the Southern Railway Company, killed in a collision of the engine which was being run by the late W. A.

James, and on which he was at the time firing as aforesaid with another engine which at the time was being run under the orders and direction of the said Southern Railway Company, and had been engaged as a helping engine in assisting to move a train over the heavy grade from the eastern base to the top of the Blue Ridge mountain-, on said line, and was running down said grade with tender in front, when said collision occurred.

VII. That it was the duty of said Southern Railway Company to have had a light on the rear of said tender, the said company negligently and wilfully failed to provide such light and the said collision and injury to plaintiff's intestate was caused by the failure to provide and place such light on said helping engine as aforesaid in order to warn engines coming from the opposite direction of its approach.

VIII. That it had been the invariable custom of said Southern Railway Company, prior to said 17th day of November 1896, and of the Richmond and Danville Railroad Company, to which it succeeded, to provide and place in rear of such helping engine, while being run down said grade, a light to warn those in danger of trains or engines running from an opposite direction of the danger and enable them to guard against it.

IX. That on or about the same day, when the accident occurred, and previous to the collision, the said, Southern Railway Company had ordered that an engine, provided with a light for the rear of the tender as aforesaid and which had theretofore been used as a helping engine be removed and had negligently failed to provide in its stead another engine with such equipment, as plaintiff's intestate had reasonable grounds to believe that the said company would do.

X. That on said 17th day of November, 1896, by reason of a contract theretofore entered into by the said Southern Railway
121 Company with intestate and others, it was the duty of said Southern Railway Company to place a conductor on said helping engine and that the said company negligently omitted and failed to discharge this duty though the said accident or injury, as plaintiff is informed and believes, — have been avoided by proper care and watchfulness of such conductor, had he been placed thereon.

XI. That it was the duty of said Southern Railway Company, not only to furnish competent engineers to run such helping engine but to furnish a sufficient number to perform that service without danger to its other employees or passengers, and that the said Southern Railway Company negligently refused, though often urged to do so, to provide another engineer to relieve Terrell, who was in charge of said helping engine, and by reason of such omission and refusal to provide such assistance, said Terrell had been compelled to run his engine almost incessantly for from twenty-four to forty-eight hours so as to completely exhaust him and render him unable to be duly watchful to avert danger, and but for the fact, that said Southern Railway Company had compelled said Terrell so to perform labor, which it was beyond the capacity of any human being

to discharge properly, the said accident and injury might have been avoided by him.

XII. That the said engine and train upon which plaintiff's intestate was firing as aforesaid was a passenger train running on schedule time and that the engineer upon the said helping enpine forgetful of the said passenger train which was coming up the mountain as aforesaid and upon which said intestate was firing, negligently and carelessly ran said helping engine down said mountain, well knowing or ought to have known by ordinary care and memory that said train was coming up the mountain, into and collided with said passenger train and by reason of said carelessness and negligence and want of ordinary care and memory upon the part of said engineer upon said helping engine and by reason of the negligence, carelessness, and want of ordinary care upon the part of the said company as herein set forth in addition to the negligence, carelessness and want of ordinary care upon the part of said engineer plaintiff's intestate was killed.

XIII. That the said John H. A. Howard, plaintiff's intes-
122 tate, was earning sixty-five dollars per month, was a man of good habits, was about thirty-six years old and had an expectancy of life for 31.1 years.

XIV. That plaintiff has been duly appointed administrator of the said John H. A. Howard and has qualified and entered upon the discharge of her duties.

Wherefore, plaintiff demands judgment against the defendant for the sum of twenty-five thousand ($25,000) dollars together with the costs of this action.

LEE S. & H. J. OVERMAN,
Plaintiff's Attorneys.

Fannie E. Howard, being duly sworn according to law says that the foregoing complaint is true of her own knowledge except as to matters stated upon information and belief and as to those matters she believes it to be true.

FANNIE E. HOWARD.

Sworn to and subscribed before me this the 20th day of March, 1897.

W. G. WATSON, *C. S. C.*

Filed 20th of March, 1897.

W. G. WATSON, *C. S. C.*

12272

NORTH CAROLINA,
Rowan County.

Superior Court, February Term, 1897.

MRS. FANNIE E. HOWARD, Administratrix of John H. A. Howard,
vs.
THE WESTERN NORTH CAROLINA RAILROAD COMPANY.

Answer.

The defendant, answering the complaint of the plaintiff says:

I. That the allegations contained in the first paragraph are not true, as therein stated, and are denied. The defendant admits that the Western North Carolina Railroad Company was a corporation chartered by, and organized under the laws of the State of North Carolina. It denies that such corporation was on the 17th day of November, 1896, authorized and empowered to transport
123 passengers and freight over any line of railroad, or that it had any servants engaged in operating the line mentioned and described in said paragraph one, or that it owed any duty to such servants. It avers that on the 17th day of November, 1896, the Southern Railway Company was in possession of the said Western North Carolina Railroad Company, as the owner thereof, by virtue of its purchase, as hereinafter set out, and that the Western North Carolina Railroad Company had absolutely nothing to do with the operation of the said line of railroad, and was in no manner liable for any of the acts of the Southern Railway Company, or for any torts committed by it.

II. That, as defendant is informed and believes, the allegations contained in the second paragraph of the plaintiff's complaint are not true, and are denied. For a further answer to said second paragraph, the defendant denies that it ever attempted to relieve itself of any duty it owed to servants or others by leasing the franchise and property to another corporation. The defendant avers, however, that it was so relieved by the sale of its franchise and property, as hereinafter set out.

III. That, as detendant is informed and believes, the allegations contained in the third paragraph are true, except so much thereof as alleges that the lease of the Western North Carolina railroad to the Richmond and Danville Railroad Company has not, and had not expired on the 17th day of November, 1896. The same is not true, and is denied.

IV. That, as defendant is informed and believes, the allegations contained in the fourth paragraph of the plaintiff's complaint are true, so far as they go; but if by said allegation it is meant to be averred that the Southern Railway Company was authorized by its charter to succeed to the rights and powers of the said Richmond and Danville Railroad Company only, then the said allegations are not true. Defendant avers the fact to be that the said Southern Railway Company had the right to purchase, absolutely, other rail-

roads, and did purchase the said Western North Carolina railroad, and was in possession of the same on the 17th day of November, 1896, as such purchaser, claiming same as the owner thereof, by virtue of said purchase, and the said line is still claimed by the said Southern Railway Company.

124 V. That, as defendant is informed and believes, the allegations contained in the fifth paragraph are true, and are admitted, except so much of said paragraph, as alleges that the relation of lessor and lessee existed between the Southern Railway Company and the Western North Carolina Railroad Company, which is not true, and is denied.

VI. That, as defendant is informed and believes, the allegations contained in the sixth paragraph of the plaintiff's complaint are not true, and are denied, except so much thereof as alleges that on the 17th day of November, 1896, the plaintiff's intestate was a fireman employed by the Southern Railway Company, and was firing on an engine which was being run over the line of railroad from Salisbury to Paint Rock, North Carolina, and that the said intestate was killed in a collision on said railroad. So much of the said paragraph is true. All other allegations contained therein are not true, and are denied.

VII. That, as defendant is informed and believes, the allegations contained in the seventh paragraph are not true, and are denied.

VIII. That, as defendant is informed and believes,, the allegations contained in the eighth paragraph of the plaintiff's complaint, are not true, and are denied.

IX. That, as defendant is informed and believes, the allegations contained in the ninth paragraph are not true, and are denied.

X. That, as defendant is informed and believes, the allegations contained in the tenth paragraph of the plaintiff's complaint are not true, and are denied.

XI. That, as defendant is informed and believes, the allegations contained in the eleventh paragraph are not true, and are denied.

XII. That, as defendant is informed and believes, the allegations contained in the twelfth paragraph of the complaint of plaintiff are not true and are denied. The defendant avers, however, that if plaintiff's intestate was killed by the negligence of the

125 engineer on the helping engine, said engineer was a fellow-servant of said intestate, in the same common employment, of the Southern Railway Company, with him.

XIII The defendant has no knowledge nor information sufficient to enable it to form a belief as to the truth of the allegations contained in the thirteenth paragraph of the plaintiff's complaint, and it therefore denies the same.

XIV. The defendant has no knowledge nor information sufficient upon which to form a belief as to the truth of the allegations contained in the fourteenth paragraph, and it therefore denies the same.

For a further answer to said complaint the defendant says:

(1.) That, as defendant is informed and believes, the plaintiff's intestate contributed by his own negligence to his injury, by disre-

garding orders given him in the management of his engine and train.

(2.) That, as defendant is informed and believes, the death of the plaintiff's intestate was caused by the negligence of a servant of the said Southern Railway Company, to wit: one W. P. Terrell, who was a fellow-servant of the plaintiff's intestate, in the same common employment of the Southern Railway Company with said intestate.

(3.) That, on the — day of ——, The Central Trust Company, of New York, a corporation duly created by and under the laws of the State of New York, filed its bill in the circuit court of the United States for the western district of North Carolina, to foreclose a mortgage theretofore executed to the said. The Central Trust Company, of New York, by the said Western North Carolina Railroad Company, to secure a large amount of bonds, to wit: in the sum of about four million dollars. That in said suit an order of sale was made by the said circuit court of the United States, by which a certain master or commissioner appointed in said order, was required to sell all the property, rights, franchises and privileges, of the said Western North Carolina Railroad Company, at public auction. That under said order, a sale of all the said property, rights, franchises and privileges, of the said Western North Carolina railroad, was had, at the depot of the said Western North Carolina Railroad Company, at Statesville, North Caro-
126 lina, by the said master or commissioner, when and where the Southern Railway Company, a corporation duly created by and under the laws of the State of Virginia, and having power and authority under its charter to purchase railroads and operate the same, *because* the purchaser of the said property, rights, franchises and privileges of the said Western North Carolina Railroad Company. That said sale was duly reported by the said master or commissioner of the court, and there was a decree of said court confirming said sale, and requiring the said master or commissioner to execute a deed to the said purchaser, The Southern Railway Company, conveying to the Southern Railway Company all the property, rights, franchises and privileges, of the said Western North Carolina Railroad Company. That such deed was executed by said master or commissioner, and delivered to the said Southern Railway Company, and the same was duly registered as requirad by law. That after the execution of said deed, the said Southern Railway Company took possession of the property, rights, franchises and privileges, of the said Western North Carolina Railroad Company, and has since that time constantly operated the said railroad, and been in continual exercise of the rights and privileges granted to the said Western North Carolina Railroad Company by its charter, and the said Southern Railway Company is still in possession of the same. That the said Western North Carolina Railroad Company was by said sale and the execution of said deed, *ipso facto* dissolved as a railroad corporation authorized and empowered to operate its railroad, and since said sale and the execution of the said deed, it has never been responsible for any of the acts of said purchaser, the Southern Railway Company, or for any torts committed by it.

Wherefore, having fully answered, the defendant demands that it be hence dismissed with its costs.

CHARLES PRICE AND
G. F. BASON,
Attorneys for Defendant.

NORTH CAROLINA, }
Wake County. }

A. B. Andrews, being duly sworn, says that he is an officer
127 of the defendant corporation, to wit: that he is president thereof. That he has read the foregoing answer, and that the same is true as of his own knowledge, except as to those matters and things therein stated as upon information and belief, and as to those he believed it to be true.

A. B. ANDREWS.

Sworn to and subscribed before me, this first day of May, 1897.

H. W. MILLER,
[SEAL.] *Notary Public.*

Filed 3rd day of May, 1897.

W. G. WATSON, *C. S. C.*

NORTH CAROLINA, }
Rowan County. }

Superior Court, February Term, 1897.

MRS. FANNIE E. HOWARD, Administratrix of John H. A. Howard, }
vs. }
THE WESTERN NORTH CAROLINA RAILROAD COMPANY. }

Reply.

Replying to the new matter contained in sections, one, two, and four of defendant's answer, the plaintiff says:

I. That it is not true, as alleged in first section of defendant's answer that the Southern Railway Company was on the 17th day of November, 1896, or at any time since said day the owner of the Western North Carolina railroad or in possession of said railroad as its owner; but the plaintiff avers on the contrary that the said Southern Railway Company is and was a foreign corporation created and organized under the laws of the State of Virginia and had not then or now power or authority to purchase or hold as owner thereof the franchise and property of the defendant, The Western North Carolina Railroad Company, and that any pretended purchase by virtue of a decree of any court was either ineffectual to pass the said franchise and property of the defendant or to vest the same in the said Southern Railway Company.

II. That it is not true, as alleged in the second section of the defendant's answer, that it did not attempt to relieve itself
128 of the duty it owed to the State of North Carolina as a carrier of freights and passengers by allowing the use of its franchise

and property to be unlawfully turned over to the said Southern Railway Company; but on the contrary plaintiff avers that on the 30 day of April, 1886, the defendant company executed and delivered to the Richmond and Danville Railroad Company, hereinbefore mentioned, a paper-writing purporting to be a lease and devise of the franchise and property of the defendant company to the said Richmond and Danville Railroad Company for the term of 99 years when the defendant company had no power or authority granted to it in its charter to so lease and devise its said franchise and property to the said Richmond and Danville Railroad Company.

The plaintiff avers that though the said pretended lease was *ultra vires* on the part of the lessor therein named the said Richmond and Danville Railroad Company took charge of the said railroad and operated it as a carrier of freights and passengers claiming under it and is estopped from denying that the relation of lessor and lessee existed between it and the defendant company, after holding itself out to the public. And plaintiff further avers that the said Southern Railway Company has not by its pretended purchase acquired the title to and become the owner of the franchise and property of the defendant company; but the said Southern Railway Company took possession of said franchise and property by virtue of a decree permitting it as a purchaser to elect whether it would operate the said Western North Carolina railroad under a claim of ownership or as lessee, as plaintiff is informed and believes, and having no notice of the exercise of its right of election it is estopped from denying and the defendant company being a party to said suit wherein said decree was entered is also estopped from denying that the said Southern Railway Company is now operating defendant's road as its lessee.

And the plaintiff is further advised, informed and believes that the defendant company consented that its franchise and property should be turned over to the said Southern Railway Company and that its lines of road should be operated by the said Southern Railway Company as aforesaid, and though the said Southern
129 Railway Company had no power or authority to purchase and hold the franchise and property of the defendant company as owner thereof or as lessee for 99 years or as assignee or purchaser of the pretended leasehold interest of the said Richmond and Danville Railroad Company and though the defendant company had no power or authority to execute said lease; but that the defendant company could not rid itself of its implied obligation to the State to see that ordinary care is exercised in furnishing safe machinery and appliances and a sufficient number of servants so as to protect servants and employees engaged in operating said road from injury.

And this plaintiff is advised that the defendant company is still answerable for the negligence of any other person, which through its constituted authorities, it permits to operate its road as a carrier of freights and passengers though without authority of law.

III. That it is not true, as alleged in the fourth section of defendant's answer, that the Southern Railway Company had the right to purchase or did in fact purchase absolutely the franchise and property of the defendant company, but it is admitted that the said Southern Railway Company was on the 17th day of November 1896 in possession of the franchise, property, and road-bed of the defendant company and had taken possession of and was operating its lines of railway with the consent of the defendant company.

Further replying to the defendant's answer, by way of new matter, the plaintiff says:

1. That she has no knowledge or information sufficient to form a belief as to any orders given to her intestate, John H. A. Howard, as to the management of his engine and train, or of any disregard of the properly constituted authorities by said intestate, and plaintiff is advised that the defence of contributory negligence is not sufficiently alleged in the first section of defendant's answer by way of new matter to enable her to understand and prepare to meet any specific allegation of negligence on the part of her said intestate; but if the court shall permit testimony to be offered in support of the plaintiff's vague allegation, plaintiff asks that it be held to strict proof.

2. That as plaintiff is advised she is not required to answer
130 the indefinite allegation of negligence on the part of the fellow-servant of her intestate, one W. P. Terrell, because the said allegations are not sufficiently specific to enable her to prepare to meet them. As plaintiff is informed and believes the death of her intestate was caused by negligence of the defendant or of the Southern Railway Company while operating its road as its lessee or by its consent, but without authority of law and she denies that the proximate cause of his injury and death was the negligence of any person other than the Southern Railway Company and that the defendant company is answerable for such negligence on the part of the Southern Railway Company.

Further replying to the new matter contained in the defendant's answer contained in the third section of said answer by way of new matter, the plaintiff says:

First. That she has no knowledge or information sufficient to form a belief as to whether the Central Trust Company of New York is a corporation duly created and organized under the laws of the State of New York, but she admits that a bill was filed by said company. That she has no knowledge or information sufficient to form a belief as to whether a mortgage was issued to said company or as to whether such mortgage was executed to secure the sum of money or bonds mentioned in said section, or as to whether such *bona fide* debt existed and plaintiff therefore denies the allegation that the mortgage was executed to secure the amount of bonds therein mentioned.

Second. That the plaintiff admits that in a suit brought by the Central Trust Company of New York a decree was entered appointing a master or commissioner to sell the franchise and property of

the defendant company at public auction, but avers that as she is informed and believes the said decree required that the said sale should be made subject to a first mortgage on the franchise and property of the defendant company which was then and is still outstanding and unsatisfied, and further that under the terms of said decree the purchaser at any sale made by virtue of it was to be allowed the privilege of operating said road at the option of said purchaser as lessee of the defendant company or the purchaser of the unexpired term of the said lease to the Richmond and Danville Railroad Company.

Third. That plaintiff has no knowledge or information
131 sufficient to form a belief as to whether a sale was made in pursuance of said decree, or whether the Southern Railway Company was declared the purchaser.

Fourth. That it is not true, as plaintiff is informed and believes, that the said Southern Railway Company had the power and authority under its charter or under the laws of North Carolina to purchase and hold the franchise and property of the defendant company or to acquire a leasehold interest in said franchise and property for the term of 99 years.

Fifth. That as plaintiff is informed and believes a report of sale was made and an order was made confirming said sale, but the pretended purchaser at said sale was, by the terms of the said decree of sale, *was* to hold subject to a first mortgage as aforesaid and was to be allowed at the option of such purchaser to operate the lines of railroad purporting to be sold as lessee. That this plaintiff has no knowledge or information sufficient to form a belief as to whether any deed purporting to convey said franchise and property has or has not been duly registered as required by law.

Sixth. That it is true that the Southern Railway Company has been operating lines of railway belonging to the defendant company since some time prior to the said 17th day of November, 1896, but the plaintiff denies that the said Southern Railway Company is either the absolute owner of the franchise and property of the defendant or is in lawful possession of the same as lessee.

Seventh. That it is not true that the Western North Carolina Railroad Company has been, by virtue of any sale, or the execution of any deed, dissolved as a railroad corporation, but on the contrary plaintiff is informed and believes and so avers that the decree under which it is claimed in the answer the sale was made recognized the continued existence of the defendant company by ordering that any sale made by virtue of it should be subject to a first mortgage of the franchise and property of the defendant company which is still outstanding and unsatisfied and which cannot be foreclosed without the presence, as a party to a suit for foreclosure, of the defendant company as a corporation, and that said decree purports only
132 to authorize a sale of the equity of redemption by reason of a default in the payment of the interest on certain second-mortgage bonds therein mentioned.

And the president of said company admits on oath in the verifi-

cation to said answer, that he is still an officer and the president of the defendant company, an existing corporation.

LEE S. & H. J. OVERMAN,
B. F. LONG,
Attorneys for Plaintiff.

Mrs. Fannie E. Howard being duly sworn says that the facts set forth in the foregoing reply as of her own knowledge are true and the facts set forth therein upon information and belief she believes it to be true.

FANNIE E. HOWARD.

Sworn and subscribed before me this 3 day of May, 1897.
W. G. WATSON, *C. S. C.*

Filed May 8, 1897.
W. G. WATSON, *C. S. C.*

NORTH CAROLINA, *Rowan County.*

Superior Court, February Term, 1898.

MRS. FANNIE E. HOWARD, Administratrix,
vs.
WESTERN NORTH CAROLINA RAILROAD COMPANY.

This action coming on for trial before his honor James D. McIver and a jury which upon issues submitted returned the following verdict, to wit:

1st. Was the death of plaintiff's intestate caused by the negligence of a fellow-servant?

Answer. No.

2nd. Was the death of plaintiff's intestate proximately caused by the negligence of the Southern Railway Company which at the time was operating the road?

Answer. Yes.

3rd. Is the defendant answerable for the negligence of the
133 Southern Railway Company in causing the death of plaintiff's intestate?

Answer. Yes.

4th. What damages is plaintiff entitled to recover?

Answer. $5,000.

Now, therefore on motion of H. J. Overman, Lee S. Overman, B. F. Long and A. C. Avery, counsel for plaintiff, it is considered and adjudged that the plaintiff, Fannie E. Howard, administratrix, of John H. A. Howard, recover of The Western North Carolina Railroad Company, the defendant above named, the sum of five thousand dollars, with interest on said sum from the 21st day of February A. D. 1898 until paid, together with the costs of this action to be taxed by the clerk.

JAS. D. McIVER,
Judge Presiding.

STATE OF NORTH CAROLINA, }
Rowan County. }

I, W. G. Watson, clerk superior court for said county of Rowan, do hereby certify the foregoing to be true copies, as filed in my office, of the summons, complaint, answer, reply and judgment, in the suit of Mrs. Fannie E. Howard, administrator of John H. A. Howard, *vs.* The Western North Carolina Railroad Company.

Witness my hand and the seal of the said office, in Salisbury, the 7th day of October, 1901.

[SEAL.]

W. G. WATSON,
Clerk Superior Court.

134 *Transcript of Record.*

United States Circuit Court of Appeals, Fourth Circuit.

MRS. CLEMYE JAMES, Administratrix of W. A. James, and Others, Appellants,
versus
THE CENTRAL TRUST COMPANY OF NEW YORK and THE Southern Railway Co., Appellees. } No. 289.

Appeal from the circuit court of the United States for the western district of North Carolina.

Record filed October 10th, 1898.

[Stamped:] Clerk's office, U. S. circuit court of appeals, fourth circuit. H. T. Meloney, clerk, Richmond.

135 *Transcript of Record.*

UNITED STATES OF AMERICA, }
Western District of North Carolina. }

Circuit Court, Fourth Circuit, at Charlotte, N. C.

At a circuit court of the United States for the western district of North Carolina, begun and held at the court-house in the city of Charlotte, N. C., on the second Monday in June, being the 13th day of the same month, in the year of our Lord one thousand eight hundred and ninety-eight—present: the Honorable Charles H. Simonton, a judge of the circuit court of the United States for the fourth circuit—among other were the following proceedings, to wit:

THE CENTRAL TRUST COMPANY OF NEW YORK, Complainant,
vs.
WESTERN NORTH CAROLINA RAILROAD COMPANY and Another, Defendants. } No. 38. In Equity.

Therefore, the following proceedings were had in said cause, to wit:

136 No. —.

Record of Suit in Circuit Court.

UNITED STATES OF AMERICA,
Western Dist. of North Carolina.

Circuit Court, Fourth Circuit, at Charlotte, N. C.

Be it remembered, that on the 20th day of April, A. D. 1894, that the Central Trust Company of New York filed their bill in our court of equity in the circuit court of the United States for said district against the Western North Carolina Railroad Company and another, which said bill of complaint and the exhibit thereto attached are in the word- and figures as follows, to wit:

UNITED STATES OF AMERICA,
Western District of North Carolina, ss:

In the Circuit Court of the United States for the Western District of North Carolina.

To the honorable the judges of the circuit court of the United States for the western district of North Carolina, sitting in equity:

Central Trust Company of New York, a corporation created and existing under the laws of the State of New York, and a citizen of the State of New York, brings this its bill of complaint against
137 the Western North Carolina Railroad Company, a corporation created and existing under the laws of the State of North Carolina, and a resident and citizen of said State of North Carolina, and an inhabitant of the western district of North Carolina, which is the district of the residence of said Western North Carolina Railroad Company, and against the Richmond and Danville Railroad Company, a corporation created and existing under the laws of the State of Virginia, and a resident and citizen of said State of Virginia, and thereupon your orator complains and says:

1st. On and prior to the 2nd day of September, 1884, said Western North Carolina Railroad Company (hereinafter styled the railroad company) was and it still is a corporation duly created, organized and existing under the laws of the State of North Carolina, and was duly authorized and empowered under the laws of said State to construct, equip, own, maintain and operate the lines of railway, and properties hereinafter mentioned, and to execute and deliver the bonds and mortgage hereinafter mentioned, and the defendant Richmond and Danville Railroad Company (hereinafter styled the Danville Company) was, and it still is, a corporation duly created, organized and existing under the laws of the State of Virginia.

2nd. Your orator was at the times hereinafter mentioned, and now is, a corporation created and existing under the laws of the State of New York, and bearing the corporation name of the Central Trust

Company of New York, and at all the times hereinafter mentioned it was, and now is, duly authorized and empowered, under the terms of its charter, to take and hold in trust the property transferred and conveyed to it in trust as hereinafter stated, and to execute and perform the trusts imposed upon it under and by virtue of the mortgage or deed of trust hereinafter described.

3rd. On or about the 2nd day of September, 1884, said rail-
138 road company, in the lawful exercise of its powers, and due corporate action having first been had, for the purpose of providing funds and means necessary to aid in the construction, completion and equipment of its railroad, and as authorized by law to do, duly determined to issue its bonds to an amount not exceeding $15,000 per mile for each mile of the whole length of its completed road, extending from Salisbury, in Rowan county, through Asheville, in Buncombe county, to Paint Rock, in Madison county, and from said Asheville to Murphy, in Cherokee county, in the State of North Carolina, payable in gold coin of the United States of America on the 1st day of July, A. D. 1914, with interest in like coin payable semi-annually on the 1st days of January and July in each year, and to secure the payment of the principal and interest of said bonds by a second mortgage signed by its president and sealed with its corporate seal, attested by its secretary, and by them duly acknowledged in the name of said company, to your orator as trustee, conveying the said railroad, road-bed, superstructure, equipment, real and personal estate, rights, privileges and franchises of said company then owned or which might be thereafter acquired; said bonds to be in such sums or amount respectively, not exceeding in the aggregate the total amount thereinbefore fixed and limited, as the board of directors might at the time of issuance decide and determine, and to be signed by the president, sealed with the corporate seal and attested by the secretary. In pursuance of the said determination, in the exercise of its lawful corporate powers, said railroad company did thereafter make and execute its two certain bonds of like form and tenor, one of said bonds being for the sum of $3,090,000, and the other of said bonds for the sum of $1,020,000, each dated September 2, 1884, and by each of which said bonds said company acknowledged itself indebted and promised to pay to your orator, or the bearer thereof, the sum therein mentioned (being respectively the sums above stated) in gold coin of the United States
of America, payable at the financial agency of said company,
139 in the city of New York on the 1st day of July, A. D. 1914, with interest thereon in like coin, payable semi-annually at said agency on the 1st days of January and July in each year, at the rate of six per centum per annum.

4th. On or about said 2nd day of September, 1884, the said railroad company, in pursuance of the determination above mentioned, and in the due exercise of its corporate powers and due corporate action having first been had, for the purpose of securing the payment of the principal and interest of the said bonds according to the terms thereof, without preference or priority by reason of the time of issue, and equally and ratably, duly made, executed and deliv-

ered to your orator its certain mortgage deed of trust, bearing date on said 2nd day of September, 1884, known as its second mortgage, and therein and thereby granted, bargained, sold, assigned, transferred and conveyed unto your orator, and its successor or successors in the trust thereby created, and its and their assigns forever, certain real and personal property described in said mortgage, as follows (the words "party of the first part" being used to designate said railroad company):

All and singular the railroad of the said Western North Carolina Railroad Company, party of the first part, in the State of North Carolina, extending from Salisbury, in Rowan county, to and through Statesville, in Iredell county, to Asheville, on or near the French Broad river, in Buncombe county; thence along the French Broad river to Paint Rock, in Madison county, and also from said Asheville westward to the Tennessee river, at or near the mouth of the Nantahala river, and thence westward to Murphy, in Cherokee county; and all real estate now owned or which may be hereafter acquired for the purposes of said railroad, including all station, depot or other grounds held and used in connection therewith; and all rails, railway tracks, sidings, switches, bridges, fences, turn-tables, water tanks, viaducts, culverts, superstructures, passenger and other depots, station and freight houses, machine shops, buildings, fixtures, rolling stock, equipment, machinery, tools and implements whatsoever, now owned or which may be hereafter acquired for the property and premises covered by the said mortgage so made to your orator as aforesaid are of a value far less in amount than the amount of the bonds issued thereunder; and that said mortgaged property and premises are and constitute an inadequate security for the payment of the said bonds. Your orator further shows that the financial affairs of the defendant railroad company and of the defendant Danville Company are in an embarrassed condition; and your orator, as trustee under said second mortgage, cannot execute or perform the trusts provided in and by said mortgage, or protect the rights of the holders of the bonds secured thereby, without the aid or interposition of this honorable court, sitting in equity, and without a judicial sale of all the mortgaged premises, franchises and appurtenances covered by the said mortgage or deed of trust, and that, until said sale can be had and the proceeds thereof distributed, it is expedient and necessary that all the said mortgaged property of every nature and description whatsoever should be placed in the possession and under the control of a receiver or receivers to be appointed by this honorable court, with such proper powers and control over the same, as to this court shall seem just. The said property covered by said second mortgage constitutes and forms one railway system, and it is for the interest of all parties that it should be sold as an entirety, and the value of it in portions and sections will be much less than its value as a whole, and, your orator is informed and believes, that said mortgaged premises are so situated that the same cannot be sold in separate parcels without great and irreparable loss and sacrifice.

11th. Your orator further alleges that there is due and owing from said defendant railroad company to your orator, or the holders of said bonds, the sum of $6,410,998.17, with interest at six per cent., on $81,598.17, from January 1, 1885, and on $123,300, from July 1, 1885, and on $123,300, from January 1, 1886, and on $123,300
141 from July 1, 1886, and on $123,300, from January 1, 1887, and on $123,300, from July 1, 1887, and on $123,300, from January 1, 1888, and on $123,300 from July 1,1888, and on $123,300, from January 1, 1889, and on $123,300, from July 1, 1889, and on $123,300 from January 1, 1890, and on $123,300, from July 1, 1890, and on $123,300, from January 1, 1891, and on $123,300, from July 1, 1891, and on $123,300, from January 1, 1892, and on $123,300 from July 1, 1892, and on $123,300, from January 1, 1893, and on $123,300, from July 1, 1893, and on $4,233,300, from January 1, 1894. Your orator is informed and believes, that no proceedings have been had at law or in equity for the collection of said debt or any part thereof, save only this suit.

Your orator, therefore, in view of the premises, seeks the aid of this honorable court in equity, wherein only adequate relief can be administered in matters of this nature, and prays as follows:

1st. That the said second mortgage, dated September 2, 1884, may be foreclosed.

2nd. That the lien of the said mortgage may be decreed and established as a lien upon the railroads and other property hereinbefore mentioned and described, subsequent, however, to the lien of said first consolidated mortgage to your orator, dated September 1, 1884, and that the amount due for principal and interest upon said bonds outstanding and secured by said mortgage may be ascertained and determined.

3rd. That in default of the payment of the sum so found due, within a time to be limited by the decree of this honorable court, it may be decreed that the defendant-, The Western North Carolina Railroad Company and The Richmond and Danville Railroad Company, and all persons claiming under them, or either of them, any interest in said mortgaged property as aforesaid, subsequent to the lien of such mortgage, be absolutely barred and foreclosed of and from all right of equity or redemption of, in and to said mortgaged premises, or any part thereof, and that a sale of the whole of
142 the mortgaged property and premises be ordered in accordance with law and the practice of this honorable court, and that the proceeds may be applied to the payment of the expenses of this suit and of the amounts found due as aforesaid, and the balance thereof as the court may direct.

4th. That a receiver or receivers be appointed to take possession of the railroad, property, estate and franchises of the defendant Western North Carolina Railroad Company, and the earnings and proceeds thereof, with power to operate the said railroad and properties, and with all such power and authority as may be requisite to preserve said property until the sale thereof, as the same may be decreed and ordered by this honorable court, and to secure the earnings of the said railroad and properties to use of the bondholders,

and with such other powers and authority as are usually vested in receivers in like cases, as this court may direct.

5th. That the defendants, and each of them, their officers, directors and all other persons claiming or pretending to claim under them, may be restrained by injunction of this honorable court from interfering with or disposing of said mortgaged premises, property and franchises, or any part or parts thereof, or any earnings or proceeds thereof.

6th. That the defendants herein, The Western North Carolina Railroad Company and The Richmond and Danville Railroad Company, may answer all and singular the premises, but not under oath, which is hereby expressly waived.

That your orator may have such other and further relief in the premises as the nature and circumstances of the case may require and to your honors seem meet.

May it please your honors to grant unto your orator not only a writ of injunction conformable to the prayer of this bill to be issued to the said Western North Carolina Railroad Company and
143 Richmond and Danville Railroad Company and their officers aforesaid, but also a writ of subpœna to be directed to the said Western North Carolina Railroad Company and Richmond and Danville Railroad Company, commanding them and each of them at a certain time and under a certain penalty to be therein specified, to be and appear before this honorable court, then and there to answer the premises and to abide by the order and decree of the court herein, and that said corporations may appear herein according to law.

CENTRAL TRUST COMPANY OF NEW YORK,
By E. FRANCIS HYDE, *Sec. Vice-Pres.*
BUTLER, STILLMAN & HUBBARD,
Solicitors for Complainant.

ADRIAN H. JOLINE, *Of Counsel.*

STATE, CITY, AND COUNTY OF NEW YORK, } ss.:
Southern District of New York, }

E. Francis Hyde, being duly sworn, deposes and says that he is an officer to wit: the second vice-president of The Central Trust Company of New York, the complainant in this suit; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true; that the seal affixed to the said bill of complaint is the corporate seal of the complainant and was thereunto affixed by due and proper authority.

E. FRANCIS HYDE.

Sworn to before me this 18th day of April, 1894.

WM. F. JUDSON,
Notary Public, Westchester Co.

Certificate filed in N. Y. Co.

144 *The Second Mortgage.*

EXHIBIT A.

This indenture, made this, the second day of September, in the year one thousand eight hundred and eighty-four, between the Western North Carolina Railroad Company, a corporation created by and organized under the laws of the State of North Carolina, party of the first part, and the Central Trust Company of New York, party of the second part, witnesseth,

That, whereas, the General Assembly of the State of North Carolina, on the twenty-ninth day of March, A. D. 1880, passed and ratified an act entitled "An act to provide for the sale of the State's interest in the Western North Carolina Railroad Company, and for other purposes," and to which said act reference is hereby made and had for more specific recital of its provisions; and

Whereas, section eight of said *Act* provided for and required the organization of "said company as a new corporation by the name of the Western North Carolina Railroad Company," upon the conditions and in the manner set forth in said section; and

Whereas, the said reorganization was duly and lawfully made in pursuance of the provisions of said section and said act, and the said Western North Carolina Railroad Company, party of the first part hereto is the said reorganized company, and is entitled to all the rights and privileges granted and conferred by said act; and

Whereas, it is provided by section nine of said act, "That after its reorganization, said company may execute and deliver mortgage deeds, with power of sale, to such trustee or trustees as may be selected by the board of directors, conveying the said railroad, property and franchises, including road-bed, superstructure, equipment, and all the real and personal estate of said company to secure the payment of such bonds and the interest thereon, as the same shall become due, as it may issue to aid in the construction, completion, and equipment of said railroad; and said mortgage deeds, when duly executed, may be recorded in the register's office in Rowan county, and their registration in that county shall be deemed an effectual and sufficient registration for all purposes, and it shall not be
145 necessary to register the same in any other county, any law to the contrary notwithstanding; provided, that no sale under the mortgage deeds herein authorized shall be made by virtue of any decree of foreclosure, or of any power of sale contained therein, without giving ninety days' notice thereof in three newspapers published in the State of North Carolina;" and

Whereas, it is provided and required by sections ten and thirteen of said act that the said mortgage deeds and the bonds that may be issued thereunder "shall have expressed in the body thereof that they are issued for the purpose of completing the said railroad and that the mortgage cannot be foreclosed for either principal or interest until said railroad shall have been completed to Paint Rock and Murphy;" and

Whereas, the General Assembly of the State of North Carolina, on the sixth day of March, A. D. 1883, passed and ratified an act entitled "An act to amend an act to provide for the sale of the State's interest in the Western North Carolina Railroad Company, and for other purposes," the said act, so amended, being the said act of March 29, 1880, hereinbefore recited; and

Whereas, by the second section of said amendatory act of March 6, 1883, it is provided that, upon the performance of certain acts and conditions therein specified, and for a more specific recital whereof reference is hereby made to said section two of said act, "the said Western North Carolina Railroad Company shall have full authority to make and execute mortgage deeds and bonds which need not contain the words "that the mortgage cannot be foreclosed for either principal or interest until said railroad shall have been completed to Paint Rock and Murphy," as provided in section ten of said act of 29th March, 1880; and

Whereas, the said acts and conditions specified and required in and by said section two of said act of March 6, 1883, have been fully performed and fulfilled, and the said Western North Carolina Railroad Company has now the right, power, and authority to execute and deliver mortgage deeds and issue bonds thereon, without expressing upon the face thereof the said words hereinbefore recited; and

Whereas, "to aid in the construction, completion, and
146 equipment" of its main and branch lines of railroad and additions and extensions thereto and thereof, the said Western North Carolina Railroad Company, did on the first day of September, A. D. 1884, execute and deliver to the Central Trust Company of New York, as trustee, its certain first consolidated mortgage deed, conveying all its lines of railroad, branches, additions and extensions, property, rights, privileges and franchises, owned on said date or thereafter acquired, to secure a proposed issue of bonds to an amount not exceeding twelve thousand five hundred dollars per mile for each mile of road, less eight hundred and fifty thousand dollars of said bonds to be retained by said trustee for the purpose of "taking up, exchanging, and canceling" bonds to said amount outstanding and issued prior to the reorganization of said company as aforesaid on a mortgage executed and delivered by the State of North Carolina, acting by her commissioners, Curtis H. Brogden, Robert F. Armfield and James L. Robinson, to David A. Jenkins, as trustee, under and by authority of an act of the General Assembly of said State passed and ratified the thirteenth day of March, A. D. 1875; and

Whereas, the amount of bonds authorized to be issued under said first consolidated mortgage will not wholly provide the means necessary to fully construct, complete and equip the said railroad; and

Whereas, the said Western North Carolina Railroad Company, for the purpose of providing funds and means necessary "to aid in the construction, completion, and equipment of said railroad," and as authorized by law to do, has duly determined to issue its bonds to an amount not exceeding fifteen thousand dollars per mile, for each

mile of the whole length of its completed road extending from Salisbury, in Rowan county, through Asheville, in Buncombe county, to Paint Rock, in Madison county, and from said Asheville to Murphy, in Cherokee county, in the State of North Carolina, payable in gold coin of the United States of America on the first day of July, A. D. 1914, with interest, in like coin, payable semi-annually on the first days of January and July in each year, and to secure the payment of the principal and interest of said bonds by a second mortgage signed by its president and sealed with its corporate seal, attested by its secretary, and by them duly acknowledged in the name of said company, to the Central Trust Company of New York, as trustee, conveying the said railroad, road-bed, superstructure, equipment,
147 real and personal estate, rights, privileges and franchises of said company now owned or which may be hereafter acquired; said bonds to be in such sums or amounts, respectively, not exceeding in the aggregate the total amount hereinbefore fixed and limited, as the board of directors may, at the time of issuance, decide and determine, and to be signed by the president, sealed with the corporate seal, attested by the secretary, and in substantially the form following, that is to say:

UNITED STATES OF AMERICA, *State of North Carolina.*

$——. No. —. $——.

Western North Carolina Railroad Company Second Mortgage, Six per Cent.

Know all men by these presents: That the Western North Carolina Railroad Company, a corporation created by and organized under the laws of the State of North Carolina, for value received, hereby acknowledges itself indebted, and promises to pay, to the Central Trust Company of New York, or the bearer hereof, the sum of —— dollars, in gold coin of the United States of America, payable at the financial agency of said company in the city of New York, on the first day of July, A. D. 1914, with interest thereon, in like coin, payable semi-annually at said agency, on the first days of January and July in each year, at the rate of six per centum per annum.

This bond is one of a series of bonds "issued for the purpose of completing said railroad," to an aggregate amount not exceeding fifteen thousand dollars per mile for each mile of road, the payment of which, with the interest as aforesaid, is secured by a mortgage bearing even date herewith, duly executed and delivered by the said Western North Carolina Railroad Company to the Central Trust Company of New York, as trustee for the holders of said
148 bonds, conveying the said railroad, road-bed, superstructure, equipment, real and personal estate, rights, privileges, and franchises of said railroad company, as specified in said mortgage, and subject to the agreements, conditions, and trusts therein expressed and declared.

This bond shall not be valid unless the certificate endorsed hereon shall be signed by said trustee.

In witness whereof, the said Western North Carolina Railroad Company has caused these presents to be signed by its president and sealed with its corporate seal, attested by its secretary, this the second day of September, A. D. 1884.

—— ——, *President.*

Attest: —— ——, *Secretary.*

Trustee's Certificate.

The Central Trust Company of New York hereby certifies that the within bond is one of a series of bonds issued under the deed of trust therein mentioned.

—— ——, *President.*

Now therefore, this indenture further witnesseth: That, in consideration of the premises, and the sum of one dollar in hand paid by each of the parties hereto to the other, the receipt whereof is hereby mutually acknowledged, it is hereby covenanted and agreed by and between the Western North Carolina Railroad Company, party of the first part, and the Central Trust Company of New York, party of the second part, as follows:

First. This mortgage shall be a security for the whole or any part of the amount of the bonds authorized to be issued as herein aforesaid, and all bonds issued hereunder shall be equally secured hereby without regard to the time when the same may be issued.

Second. The party of the first part covenants and agrees to pay to the lawful holders of the bonds hereby secured, the principal and interest therein agreed to be paid at the times and upon the terms therein mentioned.

Third. The party of the first part covenants and agrees to pay all taxes and assessments upon the premises and property hereby
149 granted and conveyed, and to keep and maintain the said railroad and property in good order and condition; and also, on being requested so to do, to pay all proper charges of the said trustee hereunder, and all reasonable disbursements made by it in the performance of its duty as such trustee.

And in further consideration of the premises, and of the sum of one dollar to it in hand paid by the said Central Trust Company of New York, the receipt whereof is hereby acknowledged, and in order to secure the payment of the principal and interest of the bonds issued hereunder, according to the terms thereof, without preference or priority by reason of the time of issue, and equally and ratably, the said Western North Carolina Railroad Company hath granted, bargained, sold, assigned, transferred, and conveyed, and by these presents doth grant, bargain, sell, assign, transfer, and convey unto the said Central Trust Company of New York, and its successor or successors in the trusts hereby created, and its and their assigns forever, the following-described real and personal property, that is to say:

All and singular the railroad of the said Western North Carolina Railroad Company, party of the first part, in the State of North

Carolina, extending from Salisbury, in Rowan county, to and through Statesville, in Iredell county, to Asheville, on or near the French Broad river, in Buncombe county; thence along the French Broad river to Paint Rock, in Madison county; and also from said Asheville westward to the Tennessee river, at or near the mouth of the Nantahala river, and thence westward to Murphy, in Cherokee county; and all real estate now owned or which may be hereafter acquired for the purposes of said railroad, including all station, depot, or other grounds held and used in connection therewith; and all rails, railway tracks, sidings, switches, bridges, fences, turn-tables, water tanks, viaducts, culverts, superstructures, passenger and other depots, station and freight depots, machine shops, buildings, fixtures, rolling stock, equipment, machinery, tools, and implements whatsoever now owned or which may be hereafter acquired for the purposes of business of the said party of the first part in connection with the said railroad; and all the franchises, rights, privileges, easements, income, earnings, and profits of the said party of the first part connected with, issuing from or relating to the said herein-described railroad.

To have and to hold the above-described property, premises, franchises, rights, privileges, and appurtenances, unto the said party of the second part, its lawful successor or successors and assigns, in trust, nevertheless, for the equal *pro rata* benefit and security of all the holders of the bonds secured hereby, and which may be issued hereunder, without any preference or priority by reason of priority in time of issue or negotiations thereof, and for the objects, uses, and purposes hereinafter expressed and declared; but subject, nevertheless, to a certain indenture of mortgage or deed of trust, hereinbefore mentioned, made and executed by the party of the first part to the Central Trust Company of New York, as trustee, to secure the payment of the first consolidated mortgage bonds of the party of the first part, to the amount of not exceeding twelve thousand five hundred dollars per mile for each complete mile of the main and branch lines of railroad of the party of the first part constructed or to be constructed, and subject also to the following covenants, conditions, declarations, and agreements, that is to say:

First. These presents are upon the express condition that if the party of the first part, its successor, successors, or assigns, shall well and truly pay or cause to be paid unto the holders of the said bonds the principal and interest to grow due to them respectively, at the times and in the manner mentioned in said bonds, according to the true intent and meaning thereof, then these presents and all the estate, title, and interest, hereby granted and conveyed, shall cease, determine, and be wholly null and void.

Second. Until default shall be made in payment of the principal or interest of said bonds, or any of them, according to the tenor and effect thereof, the said party of the first part, its successor, successors, or assigns, shall possess, manage, control, operate, use, and enjoy, the real and personal property, premises, railroad, franchises, rights, privileges, and appurtenances hereby mortgaged, and receive, take,

use, and enjoy, all the income, profits, rents, revenue, and tolls thereof as fully as if this indenture had not been made, and on payment in full of the principal and interest of all the bonds issued hereunder, all the estate, interest and title hereby granted and conveyed shall absolutely cease and determine, and all the premises, property, estate, railroad, rights, privileges, and franchises, hereinbefore mentioned and described shall be reconveyed, surren-
151 dered, and delivered up to the said party of the first part, its successor, successors, or assigns, to be by it or them held and possessed as fully and completely as if this instrument had not been executed.

Third. In case default shall be made in the payment of any interest to accrue on any of such bonds, when the same may become due and payable, and such interest shall remain in arrear for six months after it shall have been duly demanded; or in case default shall be made in the payment of the principal of the said bonds hereby secured, or any or either of them, when the same shall become due and payable according to the tenor and effect thereof, and such default shall continue for the period of six months after such principal shall have been duly demanded, then, and in either of such cases, it shall be lawful for the said trustee, and upon the written request of a majority in interest of the holders of said bonds then outstanding, and an adequate indemnity being given to it against all costs, expenses, and liabilities, to be incurred in executing this article, it shall be the duty of said trustee to enter into and upon, and take possession of the railroad, real and personal property, and franchises hereinbefore described and conveyed, and to hold, use, manage, maintain, and operate, the said railroad and the business thereof, by its own managers, agents, and employees, to as full an extent as the said party of the first part may or might lawfully do, until the amount due for said principal or said interest, on said bonds, or any of them, then outstanding, shall be paid, or until sale of said mortgage premises and property shall be made as hereinafter provided; and during such period, from time to time, to make, at the cost and expense of the trust estate, such repairs, replacements, alterations, additions, and improvements thereto, as well in respect to rolling stock and equipment as to the said railroad and appurtenances, as may seem to said trustee necessary, proper, and judicious; and to collect, receive, and take, all the income, rents, revenues, tolls, profits, and issues, thereof and therefrom, and after deducting the cost and expense of operating and maintaining said railroad and conducting the business thereof, and of all repairs, replacements, alterations, additions, and improvements as aforesaid, and of all taxes and other charges upon the said premises and property, and every part thereof, and just and reasonable compensation for its own services, including reasonable attorney and counsel fees, then to apply the moneys arising as aforesaid to the payment of the interest
152 due and unpaid on said bonds, or, in case the principal of said bonds be then due to apply said moneys, without preference, priority, or distinction, of one bond over another, to the pay-

ment; first, of the interest due and unpaid on the bonds then outstanding and secured hereby; and, second, to the payment of the principal of said bonds in full, if said proceeds be sufficient thereto, but if not, then *pro rata*. And in case the moneys arising and received as aforesaid, shall be sufficient to the payment of the said specified costs, expenses, charges, taxes, and interest and principal of said bonds as aforesaid, the said trustee shall forthwith surrender, deliver up, and restore, the possession, control, use, and enjoyment of the said railroad, property, premises, and franchises, together with any and all surplus or remainder of said moneys or proceeds, if any there may be, to the said party of the first part, its successor, successors, or assigns.

Fourth. In case default shall be made in the payment of any interest to accrue on any of said bonds, when the same may become due and payable, and such accrued interest shall remain in arrear for six months after it shall have been duly demanded, it shall be lawful for said trustee, and on the written demand of a majority in interest of all of the holders of said bonds at the time outstanding, it shall be the duty of the said trustee to declare the whole principal of said bonds, with all accrued and unpaid — thereon, to be due and payable, and in such case, or in case default shall be made in the payment of the said principal of said bonds, when the same shall become due and payable, according to the tenor and effect thereof, then, and in either of said cases, it shall be lawful for the said trustee, and upon the request of a majority in interest of all of the holders of said bonds then outstanding and an adequate indemnity to said trustee against all costs, expenses, and liabilities to be incurred in executing this article, it shall be the duty of said trustee, with or without entry, but subject to the lien of the said first consolidated mortgage, to sell the said railroad, premises, property and corporate rights and franchises hereby mortgaged and conveyed, or as much thereof as may be requisite to provide for the payment of the principal and interest due on said bonds according to the terms thereof, or the provisions of this article, to the highest bidder at public auction in the town of Salisbury in the State of North Carolina, after giving at least ninety days' notice of the time and
153 place and terms of such sale and of the specific property to be sold, by advertisements in at least three newspapers published in the State of North Carolina, one of which newspapers shall be published at Salisbury and one at Raleigh, in said State, and after such notice, the said trustee may make said sale in accordance herewith, or may adjourn the same to a subsequent date whereon said sale shall be made upon like notice published in like manner, and upon the consummation of such sale the said trustee, shall execute and deliver to the purchaser or purchasers of said property, or such part or portion thereof as may be sold, good and sufficient transfers, assignments, and conveyances in law for the same, and deliver possession thereof, and thereupon the said sale, so made as aforesaid, shall be a perpetual bar, both at law and in equity, against the said party of the first part, its successor, successors, and assigns, and against all persons whomsoever lawfully claiming the said

property through or under it or them, otherwise than as hereinbefore excepted; and upon the completion of said sale as aforesaid the principal of all bonds issued hereunder and at such time outstanding shall forthwith become due and payable, anything in said bonds to the contrary notwithstanding. And after deducting from the proceeds of such sale all costs and expenses thereof, including attorney and counsel fees, and all expenses, advances, and liabilities which may have been made or incurred by it in or about the performance of its duties under these presents or in relation to said property, including the maintenance and operation of said railroad and managing the business thereof while in possession thereof, and all taxes, assessments, and other proper charges upon said property or any part thereof, and a reasonable compensation for its own services, said trustee shall apply the proceeds of such sale to the payment in full or *pro rata* as such net proceeds may suffice, in the first instance, of all or any overdue and unpaid interest, and thereafter to the payment of the principal and interest due and unpaid upon said bonds then outstanding, without discrimination as between principal and interest, if said net proceeds shall be sufficient thereto, but if not, then ratably and without preference, and if after payment of said principal and interest in full, a surplus of such proceeds shall remain, said trustee shall pay over the same to the party of the first part, its successor, successors, or assigns. And it is hereby
154 declared that the receipt of said trustee shall be a full and sufficient discharge to the purchaser or purchasers of the property sold at said sale for his or their purchase-money, and that he or they after payment thereof and holding such receipt shall not be liable for the proper application of said purchase-money, or in any manner answering for its loss or misapplication in whole or in part.

Fifth. In case of the sale of the said premises and property, whether by the said trustee, as aforesaid, or under judicial proceedings, the holders of the bonds hereby secured or any of them or the said trustee on behalf of said bondholders, shall have the right to purchase on equal terms with other persons, and any purchaser or purchasers at said sale, after making a cash payment sufficient to cover the costs and expenses of the sale, and all other charges required to be paid or provided for in actual cash, to be determined by the said trustee, shall have the right to deliver and pay to said trustee, as cash towards the payment of the residue of the purchase-money, any of said bonds to or towards the payment whereof the net proceeds of such sale shall be legally applicable, the amount of such bonds so to be paid in to be determined and fixed by the said trustee and at a sum which shall, upon a proper distribution and accounting for such proceeds, be at least equal to the share or proportion payable out of such net proceeds to the holder or holders of such bonds.

Sixth. The said trustee shall at all times have full power and authority to release and convey to any party or parties who may be designated in writing by the said party of the first part to receive the same, or to release from the lien and operation of these presents,

any portion of the premises or property, lands, tenements or hereditaments hereinbefore granted and conveyed, which may be or become unnecessary for use in connection with said railroad by reason of any change in the location of any track or tracks or the appurtenances thereto, or of any depot, station-house, shop, or other buildings or structures connected with said railroad, or which the said party of the first part may deem it expedient to disuse or abandon by reason of such change or for any other good reason; and the said trustee may consent to any change in the location of said track or tracks and the appurtenances thereto, or of any depots, station-houses, shops or other buildings or
155 structures which, in the judgment of the said party of the first part, shall become expedient, and may make and deliver all instruments requisite to carry the same into effect, or to convey and release as aforesaid, any of the said premises, real estate, chattels real, property, lands, tenements, or hereditaments of the party of the first part hereby mortgaged and conveyed and which the said party of the first part may desire to sell, lease, or otherwise dispose of, provided such instruments shall be duly executed as will cause the lein of this mortgage to attach to all lands, tenements, and hereditaments taken and used by the party of the first part, its successor, successors or assigns, in place of the lands, tenements and hereditaments disused as aforesaid: And that in case of the sale of any such lands, without exchanging them, or reinvesting the proceeds in other lands, the said proceeds of such sale, remaining after complying with the provisions of the first consolidated mortgage of the party of the first part, dated the first day of September, A. D. 1884, and hereinbefore mentioned and recited, shall be paid over to the said trustee to be by it held in lieu of said lands, for the purposes of this trust, or applied to the purchase of bonds secured by this mortgage if the said party of the first part shall so elect and require, which said bonds when so purchased, shall be cancelled by said trustee and forthwith be returned and delivered up to the said party of the first part, its successor, successors, or assigns. And the said trustee shall also have full power to permit the said party of the first part at its discretion, from time to time, to dispose of such portion of the machinery, rolling stock, equipment, tools, implements, material, and other personal property which shall be at any time acquired and held for the use of said railroad, and shall have become unfit or unnecessary for such use, but any and all new or other machinery, rolling stock, equipment, tools, implements, material, or other personal property which may be acquired in substitution for any so released shall become and be, immediately upon the acquisition thereof, subject to the lien and operation of these presents without any other or new conveyance or transfer, or other act or proceeding whatsoever.

Seventh. In case a vacancy shall at any time occur in the office of trustee hereunder, by resignation or other cause the board of directors of the said party of the first part shall have the right
156 to fill such vacancies by the appointment of a new trustee, provided such appointment be made within ninety days next

succeeding the occurrence of such vacancy, and the successor so appointed shall, without any or further act, deed or conveyance, become and be the trustee hereunder, and shall be vested with and entitled to all the rights, title, interest, estate, powers, duties, and trusts herein and hereby granted, conveyed, created, expressed, and declared as fully as if herein originally named as trustee.

Eighth. The estate, title and interest herein and hereby conveyed shall be held and the sale herein and hereby authorized shall be made and the powers herein and hereby given and granted shall be exercised and the trusts herein and hereby created, expressed and declared, shall be performed fully, subject in all respects to the priority and lien of the first consolidated mortgage of the said party of the first part dated the first day of September, A. D. 1884, hereinbefore mentioned and recited, and to the agreements, covenants, conditions, uses, and trusts therein made, expressed, contained and declared, anything herein contained to the contrary notwithstanding.

In witness whereof the said Western North Carolina Railroad Company has caused its corporate seal to be hereunto affixed and these presents to be signed by its president and attested by its secretary in pursuance of a resolution of its board of directors and also to be signed by two members of its corporation and attested by two witnesses on the day and year first above written.

And at the same time and for the purposes of evidencing its acceptance of the trusts herein and hereby created, the said Central Trust Company of New York has likewise caused its corporate seal to be hereto affixed and these presents to be signed by its president and attested by its secretary in pursuance of a resolution of its board of directors.

THE WESTERN NORTH CAROLINA RAILROAD COMPANY,
By A. B. ANDREWS, *Pres't.*
GEO. P. ERWIN, *Sec'y.* [L. S.]
S. H. WILEY,
W. E. ANDERSON,
Members of the Corporation.

Signed, sealed, &c., in the presence of
D. SCHENCK.
JAS. W. WILSON.

157 CENTRAL TRUST COMPANY OF NEW YORK,
By G. SHERMAN, *Vice-President.* [L. S.]

Attest:
B. G. MITCHELL,
Ass't Secretary.

Signed and sealed in the presence of
G. S. ELLIS.
H. E. MALIN.

STATE OF NORTH CAROLINA, } ss:
County of Rowan, }

I, J. M. Horah, clerk of the superior court in and for the county and State aforesaid, do hereby certify that on this the 22nd day of September, in the year of our Lord one thousand eight hundred and eighty-four, before me personally appeared Alexander B. Andrews, and George P. Erwin, and S. H. Wiley, and W. E. Anderson, to me known, who being duly sworn, each for himself, did depose and say that the said Alexander B. Andrews is president, and the said George P. Erwin is secretary of the Western North Carolina Railroad Company, the corporation described in and which executed the foregoing mortgage deed of trust; that the seal thereto affixed is the corporate seal of said company, and was so affixed by order of its board of directors, and that by like order and authority, they, respectively, signed their names thereto, and did, respectively, acknowledge the due execution of said mortgage deed of trust to be the act and deed of the said Western North Carolina Railroad Company for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal on the day and year last above written.

J. M. HORAH, [L. S.]
Clerk Superior Court, Rowan County.

158 STATE OF NORTH CAROLINA, } ss:
County of Rowan, }

I, John M. Horah, clerk superior court in and for the county and State aforesaid, do adjudge that the foregoing mortgage deed of trust has been duly acknowledged. Therefore let the same, with the annexed certificate be registered.

J. M. HORAH, [L. S.]
Clerk Superior Court, Rowan County.

STATE OF NEW YORK, } ss:
City and County of New York, }

I, Charles Edgar Mills, a commissioner for the State of North Carolina, duly commissioned and qualified, residing in said city and county of New York, do hereby certify that George Sherman, the vice-president of the Central Trust Company of New York, personally appeared before me on this 27th day of September, A. D. 1884, who being duly sworn, did depose and say that he resided at New York city, in the State of New York, that he is the vice-president of the Central Trust Company of New York, the corporation described in and who executed the foregoing instrument, that the seal affixed to said instrument is the corporate seal of said corporation, affixed thereto by due authority. And at the same time the said George Sherman as such vice-president, acknowledged to me the due execution of the foregoing instrument as his act and deed and the act and deed of said corporation, The Central Trust Company of New

York, and caused said instrument to be attested by subscribing witnesses.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 27th day of September, A. D. 1884.

CHARLES EDGAR MILLS, [L. S.]
Commissioner for North Carolina in New York,
115 *and* 117 *Broadway, N. Y. City.*

159 NORTH CAROLINA, }
Rowan County. }

Superior Court, 1st October, 1884.

The foregoing certificate of Charles Edgar Mills, commissioner, &c., is adjudged to be correct. Let the instrument, with the certificate, be registered.

Witness my hand and official seal.

J. M. HORAH, [L. S.]
Clerk Superior Court, Rowan County.

STATE OF NORTH CAROLINA, }
Rowan County. }

OFFICE OF REGISTER OF DEEDS OF SAID COUNTY.

I, Horatio N. Woodson, register of deeds in and for the county of Rowan, State of North Carolina, do hereby certify that the foregoing mortgage was filed in this office for registration on the first day of October, A. D. 1884, at 4 o'clock p. m. and registered.

HORATIO N. WOODSON,
Register of Deeds.

STATE OF NORTH CAROLINA, }
Rowan County. }

I, John M. Horah, clerk of the superior court, in and for the county of Rowan, State of North Carolina, do hereby certify that Horatio N. Woodson is the register of deeds in and for said county and State, and that his signature to the certificate last above is in his own proper handwriting.

In witness whereof, I have hereto set my hand and affixed my official seal this first day of October, 1884.

J. M. HORAH,
Clerk Superior Court, Rowan Court.

Filed in this office April 20th, 1894.

H. C. COWLES, *Clerk.*

160 *Answer of W. N. C. R. R. and R. & D. R. R. Co.*

Circuit Court of the United States, Western District of North Carolina.

CENTRAL TRUST COMPANY OF NEW YORK, Trustee,
vs.
WESTERN NORTH CAROLNA R. R. CO. ET AL. } In Equity.

The Western North Carolina Railroad Company and The Richmond and Danville Railroad Company separately answer the bill of complaint herein and admit all the material allegations therein contained and submit to the entry of such decree thereunder as to the court may seem meet.

WESTERN NORTH CAROLINA
R. R. COMPANY,
By A. B. ANDREWS, *President.*
RICHMOND & DANVILLE R. R.
COMPANY,
By HENRY CRAWFORD,
General Counsel.

Filed in this office April 30th, 1894.

H. C. COWLES, *Clerk.*

161 *Amendment to Bill of Complaint.*

In the Circuit Court of the United States for the Western District of North Carolina.

CENTRAL TRUST COMPANY OF NEW YORK, Complainant,
against
WESTERN NORTH CAROLINA RAILROAD CO. ET AL., Defendants.

Now comes the complainant, Central Trust Company of New York, and for amendment to its bill of complaint heretofore filed in this cause respectively shows to the court, that it is the trustee of and under a certain mortgage of the defendant Western North Carolina Railroad Company dated September 1, 1884, and mentioned in the original bill of complaint herein; that under and in accordance with the terms of said mortgage or deed of trust there have been duly certified by the endorsement thereon of the certificate of your orator, as provided in said mortgage or deed of trust, and there have been issued and delivered by your orator in accordance with the provisions of said mortgage or deed of trust, 3,856 bonds, amounting to the principal sum of $3,856,000 and your orator is informed and believes that all of said bonds have been negotiated and sold to purchasers of the same for value and are now outstanding.

Wherefore your orator prays, as it has prayed in its original bill

in this cause, and for such other relief in the premises as may be just.

BUTLER, STILLMAN & HUBBARD,
Solicitors for Complainant.

ADRIAN H. JOLINE, *Of Counsel.*

Filed May 2nd, 1894.
N. GOFF,
Circuit Judge.

Filed in this office May 5th, 1894.

H. C. COWLES, *Clerk.*

162 In the Circuit Court of the United States for the Western District of North Carolina.

CENTRAL TRUST COMPANY OF NEW YORK, Complainant,
against
WESTERN NORTH CAROLINA RAILROAD CO. ET AL., Defendants.

This cause came on to be heard at this term upon the bill of complaint of the Central Trust Company of New York, and exhibit, and the answer of the defendants thereto, and upon the several papers and proceedings in the cause, and was argued by counsel, and thereupon, upon consideration thereof, the court being fully advised in the premises, upon motion of the complainant Central Trust Company of New York, by its solicitors, it is,

Ordered, adjudged and decreed as follows, to wit:

1st. The court finds that the material allegations of the bill of complaint of the complainant Central Trust Company of New York are true.

2nd. That on and prior to the 2nd day of September, 1884, said Western North Carolina Railroad Company (hereinafter styled the railroad company) was and it still is a corporation duly created, organized and existing under the laws of the State of North Carolina, and was duly authorized and empowered under the laws of said State to construct, equip, own, maintain and operate the lines of railway and properties hereinafter mentioned, and to execute and deliver the bonds and mortgage hereinafter mentioned, and the defendant Richmond and Danville Railroad Company (hereinafter styled the Danville Company) was, and it still is, a corporation duly created, organized and existing under the laws of the State of Virginia.

3rd. Complainant was at the times hereinafter mentioned, and now is, a corporation created and existing under the laws of
163 the State of New York, and bearing the corporate name of the Central Trust Company of New York, and at all the times hereinafter mentioned it was, and now is, duly authorized and empowered, under the terms of its charter, to take and hold in trust the property transferred and conveyed to it in trust as herein-

after stated, and to execute and perform the trusts imposed upon it under and by virtue of the mortgage or deed of trust hereinafter described.

4th. That on or about the 2nd day of September, 1884, said railroad company, in the lawful exercise of its powers, and due corporate action having first been had, for the purpose of providing funds and means necessary to aid in the construction, completion and equipment of its railroad, and as authorized by law to do, duly determined to issue its bonds to an amount not exceeding $15,000 per mile for each mile of the whole length of its completed road, extending from Salisbury, in Rowan county, through Asheville, in Buncombe county, to Paint Rock, in Madison county, and from said Asheville to Murphy, in Cherokee county, in the State of North Carolina, payable in gold coin of the United States of America, on the 1st day of July, A. D. 1914, with interest in like coin payable semi-annually on the 1st day of January and July in each year, and to secure the payment of the principal and interest of said bonds by a second mortgage signed by its president and sealed with its corporate seal, attested by its secretary, and by them duly acknowledged in the name of said company, to complainant, as trustee, conveying the said railroad, road-bed, superstructure, equipment, real and personal estate, rights, privileges and franchises of said company then owned or which might be thereafter acquired, said bonds to be in such sums or amounts respectively, not exceeding in the aggregate the total amount thereinbefore fixed and limited, as the board of directors might at the time of issuance decide and determine, and to be signed by the president, sealed with the corporate seal and attested by the secretary. That in pursuance of the said determination, in the exercise of its lawful corporate powers
164 said railroad company did thereafter make and execute its two certain bonds of like form and tenor, one of said bonds being for the sum of $3,090,000 and the other of said bonds for the sum of $1,020,000, each dated September 2, 1884, and by each of which said bonds said company acknowledged itself indebted, and promised to pay to complainant, or the bearer thereof, the sum therein mentioned (being respectively the sums above stated) in gold coin of the United States of America, payable at the financial agency of said company, in the city of New York, on the 1st day of July, A. D. 1914, with interest thereon in like coin, payable semi-annually at said agency on the 1st days of January and July in each year, at the rate of six per centum per annum.

5th. That on or about said 2d day of September, 1884, the said railroad company, in pursuance of the determination above mentioned, and in the due exercise of its corporate powers, and due corporate action having first been had, for the purpose of securing the payment of the principal and interest of the said bonds according to the terms thereof, without preference or priority by reason of the time of issue, and equally and ratably, duly made, executed and delivered to complainant its certain mortgage or deed of trust, bearing date on said 2nd day of September, 1884, known as its second mortgage, and therein and thereby granted, bargained, sold,

assigned, transferred and conveyed unto complainant and its successor or successors in the trust thereby created, and its and their assigns forever, certain real and personal property described in said mortgage, as follows (the words "party of the first part" being used to designate said railroad company.)

"All and singular the railroad of the said Western North Carolina Railroad Company, party of the first part, in the State of North Carolina, extending from Salisbury, in Rowan county, to and through Statesville, in Iredell county, to Asheville, on or near the
165 French Broad river, in Buncombe county; thence along the French Broad river to Paint Rock, in Madison county, and also from said Asheville westward to the Tennessee river, at or near the mouth of the Nantahala river, and thence westward to Murphy, in Cherokee county; and all real estate now owned or which may be hereafter acquired for the purposes of said railroad, including all station, depot or other grounds held and used in connection therewith; and all rails, railway tracks, sidings, switches, bridges, fences, turn-tables, water tanks, viaducts, culverts, superstructures, passenger and other depots, station and freight houses, machine shops, buildings, fixtures, rolling stock, equipment, machinery, tools and implements whatsoever, now owned or which may be hereafter acquired for the purposes or business of the said party of the first part in connection with the said railroad; and all the franchises, rights, privileges, easements, income, earnings and profits of the said party of the first part connected with, issuing from or relating to the said herein-described railroad."

To have and to hold the above-described property, premises, franchises, rights, privileges and appurtenances unto complainant, its lawful successor or successors and assigns in trust nevertheless for the equal *pro rata* benefit and security of all the holders of the bonds secured thereby, and which might be issued thereunder, without any preference or priority by reason of priority in time of issue or negotiation thereof, and for the objects, uses and purposes in said mortgage or deed of trust expressed and declared, but subject, nevertheless, to a certain indenture of mortgage or deed of trust, dated September 1, 1884, made and executed by said railroad company to complainant, as trustee, to secure the payment of the first consolidated mortgage bonds of said railroad company to the amount of not exceeding $12,500 per mile for each complete mile of the main and branch lines of railroad of said railroad company, constructed or to be constructed.

6th. That said mortgage or deed of trust was authorized,
166 made, executed and delivered in all respects in conformity with law, and was duly recorded in the office of the register of deeds of Rowan county, North Carolina, October 1, 1884.

That complainant duly accepted the trust created in and by said mortgage or deed of trust before the recording of said mortgage or deed of trust as aforesaid.

7th. That the said bonds of $3,090,000 and $1,020,000, amounting in the aggregate to $4,110,000 of principal, par value, so made and executed as aforesaid, were delivered by said railroad company to

complainant, to be by complainant certified in the manner and upon the terms provided in said mortgage or deed of trust securing the same, and complainant has, in accordance with the terms and provisions of said mortgage or deed of trust, certified, issued and delivered said bonds to the amount of $4,110,000 of principal, par value, and said bonds have been negotiated and sold to purchasers of the same for value, who thereby have become *bona fide* holders thereof.

8th. That in and by said mortgage or deed of trust it was, among other things, provided and declared that, in case default should be made in the payment of any interest to accrue on any of said bonds when the same might become due and payable, and such accrued interest should remain in arrear for six months after it should have been duly demanded, it should be lawful for complainant, and, on the written demand of a majority in interest of all of the holders of said bonds at the time outstanding, it should be the duty of complainant to declare the whole principal of said bonds, with all interest accrued and unpaid thereon, to be due and payable.

9th. That the said railroad company made default in the payment on the 1st day of July, 1885, of interest due on that day on said bonds issued and outstanding, as aforesaid to the amount of $4,110,000, and secured by said mortgage to complainant, and said default continues. That demand was duly made on the said
167 railroad company for the payment of the interest due upon said bonds secured by said second mortgage which became due and payable on July 1, 1885, and payment of the same was refused, and that neither on said 1st day of July, 1885, nor at any time since, did the said railroad company have at its financial agency, in the city of New York or elsewhere, any funds with which to pay said interest, or any part thereof, or any subsequently accruing interest upon said bonds. That the said railroad company also made default in the payment of the semi-annual installments of interest upon said bonds which became due and payable, respectively, January 1, 1886, July 1, 1886; January 1, 1887, July 1, 1887; January 1, 1888, July 1, 1888; January 1, 1889, July 1, 1889; January 1, 1890, July 1, 1890; January 1, 1891, July 1, 1891; January 1, 1892, July 1, 1892; January 1, 1893, July, 1893; and January 1, 1894, and also, made default in *in* the payment of interest upon said bonds from September 2, 1884, the date thereof, to January 1, 1885, which interest became due January 1, 1885. That after default had been made in the payment of interest accrued on said bonds when the same became due and payable, and after such accrued interest had remained in arrear for six months after it had been duly demanded, a majority in interest of all the holders of said bonds at the time outstanding demanded in writing that complainant should declare the whole principal of said bonds, with all interest accrued and unpaid thereon, to be due and payable, and thereupon complainant did, on the 17th day of April, 1894, duly declare the whole principal of said bonds, with all interest accrued and unpaid thereon, to be due and payable, and thereupon the same became due and payable forthwith. That complainant had been requested in writ-

ing, by a majority in interest of all the holders of said bonds outstanding, to foreclose said mortgage and enforce the rights of the bondholders thereunder by proceedings at law or in equity to that end.

168 10th. That the said railroad company heretofore made, executed and delivered to the defendant Danville Company a certain lease, whereby it leased and demised to said Danville Company its railway and property, and said Danville Company took possession thereof and remained in possession of said railway and property until the appointment of receivers of said railway and property.

11th. That the amount of interest upon and principal of said bonds secured by said mortgage or deed of trust dated September 2, 1884, which is in default and is now due and payable, is as follows;

Interest due January 1, 1885	$81,598.17
" " July 1, 1885	123,300.00
" " January 1, 1886	123,300.00
" " July 1, 1886	123,300.00
" " January 1, 1887	123,300.00
" " July 1, 1887	123,300.00
" " January 1, 1888	123,300.00
" " July 1, 1888	123,300.00
" " January 1, 1889	123,300.00
" " July 1, 1889	123,300.00
" " January 1, 1890	123,300.00
" " July 1, 1890	123,300.00
" " January 1, 1891	123,300.00
" " July 1, 1891	123,300.00
" " January 1, 1892	123,300.00
" " July 1, 1892	123,300.00
" " January 1, 1893	123,300.00
" " July 1, 1893	123,300.00
" " January 1, 1894	123,300.00
Principal	4,110,000.00
Interest on principal from January 1, 1894, to date of decree	82,200.00
Total	$6,493,198.17

It is therefore considered, adjudged and decreed:

1st. That the lien of the said bonds and coupons issued under and secured by the said second mortgage of the Western North Carolina Railroad Company, dated September 2, 1884, is a valid lien upon the railroads and other property hereinbefore men-

169 tioned and described, subject, however, to the lien of the first consolidated mortgage of said defendant railroad company to the complainant Central Trust Company of New York, dated September 1, 1884, under which, bonds amounting to the principal sum of $3,856,000.00 have been issued, negotiated and sold to purchasers of the same for value, and are now outstanding.

2nd. That the defendant Western North Carolina Railroad Company shall, after the entry of this decree and at any time before the actual execution hereof by sale hereunder, pay or cause to be paid to the complainant Central Trust Company of New York, or to the clerk of this court, for the use and benefit of the holders of the outstanding bonds of the Western North Carolina Railroad Company, secured by said second mortgage, dated September 2, 1884, the sum of $6,493,198.17 in gold coin of the United States, with interest thereon from the date of the entry of this decree to the date of payment, being the sum adjudged to be due and payable by said defendant railroad company and secured by said second mortgage.

3rd. That unless the said payment as hereinbefore directed shall be made within the time directed as aforesaid, the said second mortgage dated September 2, 1884, be foreclosed, and all property, rights or interests conveyed thereby, and upon which said mortgage is a lien, as the said property is hereinbefore particularly described, be sold as is hereinafter directed, and that under and by said sale all equity of redemption of the defendants and of any and all persons claiming by, through or under the said defendants, or represented by any of the parties hereto (except the interest of the complainant Central Trust Company of New York as trustee of and under said first consolidated mortgage, dated September 1, 1884), of, in and to said mortgaged premises, property, rights, and franchises, and every part and parcel thereof, embraced or included or intended to be included in the said mortgage, be foreclosed and cut off and forever barred.

170 4th. That the property covered by the said second mortgage of the Western North Carolina Railroad Company, dated September 2, 1884, shall, subject to the provisions aforesaid, and in default of the payment of the sums hereinbefore found to be due and directed to be paid, be sold as an entirety and in one parcel, without valuation, appraisement, redemption or extension (subject, however, to said first consolidated mortgage, dated September 1, 1884, which is not foreclosed in this suit), at public auction, to the highest bidder or bidders, at the passenger station of the Western North Carolina Railroad Company at Statesville, North Carolina, on a day and at an hour to be fixed by the special master herein appointed in his advertisement of sale, such day and hour to be fixed in accordance with the request of the solicitors for the complainant, and previous notice of the time, place and terms of said sale shall be given by publication of a brief general advertisement referring to this decree for further particulars and for a more specific description of the property herein ordered to be sold, which advertisement shall be published at least once a week for a term of thirteen weeks preceding the day of sale in three weekly newspapers published in the State of North Carolina, the first publication in each of said newspapers to be made at least ninety days before the day fixed for such sale.

The special master may at the request of the complainant adjourn or postpone said sale, and may without further notice proceed with the said sale at any date to which the same may have been thus

adjourned. Such special master may give such further notice of sale in addition to the notice above described as he may think proper or as the complainant may request.

The complainant or any bondholder or bondholders may bid and purchase at said sale.

In making such sale the said special master shall accept no bid for the property from any bidder for a sum less than $500,000 nor from any bidder who shall not place in his hands or deposit
171 with him at the time of making the bid, as a pledge that such bidder will make good his bid if accepted by the court, the sum of $50,000, in money or certified check, or in bonds secured by the mortgage hereby foreclosed, taking the same at par of their principal.

Of the price for which said property shall be sold there shall be paid in cash at the time of sale the cash deposit hereinbefore required, which shall be received as a part of the purchase price, and also at the same time and from time to time thereafter such further portions of said purchase price shall be paid in cash as the court may direct in order to meet the expenses of this suit and to pay such claims, if any, against the mortgaged property as the court may adjudge to be prior in equity to the said mortgage hereby foreclosed. All sums of money received by the said special master shall be placed in such bank or banks as the court may direct. The court reserves the right to reject any bid, and to resell said premises and property, upon failure of any purchaser for twenty days to comply with any order of the court requiring payment. The balance of the purchase price not required to be paid in cash may either be paid in cash, or the purchaser may satisfy and make good such balance of his bid in whole or in part by paying over and surrendering outstanding bonds secured by the mortgage hereby foreclosed, said bonds being received at such price or value as shall be equivalent to the amount that the holders thereof would be entitled to receive thereon in case the entire purchase price were paid in cash. All bonds that may be used to make such payment shall be surrendered to the special master and canceled, if the whole amount due thereon is applied upon the purchase price; but if less than said whole amount is applied, then the amount so applied shall be stamped or written upon said bonds, which shall then be returned to the holder.

As soon as any sale shall have been made by the said special master, in pursuance of this decree, he shall report the same to this court for confirmation, further certifying to the court compli-
172 ance by the purchaser or purchasers with the conditions of sale as hereinbefore prescribed. If any bid shall be accepted by the court, and the person making the same shall fail to comply with all the conditions of sale and all orders of the court in respect thereto, the sum deposited by the bidder shall be forfeited, and shall be applied as the court may direct.

The purchaser or purchasers at said sale shall, as part of the consideration for such sale, take the property purchased upon the express condition that he or they, or his or their assigns approved

by the court, will pay off and satisfy any and all claims filed in this cause, but only when the court shall allow such claims and adjudge the same to be prior in lien to the mortgage foreclosed in this suit, and in accordance with the order or orders of the court allowing such claims and adjudging with respect thereto, and the purchaser or purchasers, or their approved assigns, shall be entitled to appeal from any and all orders or decrees of the court in respect to such claims or any of them, and shall have all the right in respect to such appeals which the complainant Central Trust Company of New York would have in case such appeals had been taken by it. The purchaser or purchasers at said sale shall also, as part of the consideration, in addition to the payment of the sum or sums bid, take the property purchased upon the express condition that he or they, or his or their assigns approved by the court, will pay off and satisfy all debts or obligations incurred or to be incurred by the receivers having possession of such property which have not been or shall not be paid by said receivers and which shall be adjudged by the court to be debts or obligations properly chargeable against the property purchased, and to be prior or superior to the lien of the mortgage foreclosed in this suit.

The court reserves the right to retake and resell said property in case of the failure or neglect of purchaser or purchasers, or his or their assigns approved by the court as aforesaid, to comply with any order of the court in respect to payment of prior lien claims
173 above mentioned within twenty days after service of a copy of such order upon said purchaser or purchasers, or his or their assigns.

The purchaser or purchasers at said sale shall not be required to assume or adopt any leases of any railway or railways owned or held by the railroad company as lessee, but shall have the right to elect whether or not to assume or adopt the same or any thereof.

5th. The funds arising from the sale of the said mortgaged property shall be applied as follows, to wit:

First. To the payment of costs of this suit, including all proper expenses of the sale herein ordered, and such compensation as may be awarded by the court to said special master for making said sale, and the compensation of the complainant Central Trust Company of New York for its services, charges and expenses in the execution of its trust, to be allowed by the court, and such proper allowances as the court may make for the fees and disbursements of solicitors and counsel of said complainant.

Second. To the payment ratably of the principal and interest due and unpaid upon said bonds secured by said second mortgage of September 2, 1884.

Third. Should there be any surplus remaining after making the payments above directed, the same shall be paid into the registry of this court, to abide such order or decree as the court may make in respect thereto.

It is further ordered, adjudged and decreed that Charles Price, of Salisbury, North Carolina, be, and he is hereby, appointed special master to execute this decree, and, upon confirmation of the sale,

hereby directed to make, execute and deliver to the purchaser or purchasers thereof a deed or deeds of the property sold, and at the time of the execution of said deed or deeds the receiver appointed in this suit shall make, execute and deliver to the said purchaser or purchasers good and sufficient deeds of conveyance or evidence of transfer of any and all property sold which is vested in or standing in the name of said receivers, or to which said receivers have
174 in any manner acquired title; and upon confirmation of such sale, and full compliance with the terms of sale by the purchaser or purchasers, he or they shall be entitled to a deed or deeds of assurance, to be executed according to law by the Western North Carolina Railroad Company.

6th. The purchaser or purchasers of the property herein decreed to be sold shall be invested with, and shall hold, possess and enjoy, the said mortgaged premises and property herein decreed to be sold, and all the rights, privileges and franchises appertaining thereto, as fully and completely as the said Western North Carolina Railroad Company now holds and enjoys, or has heretofore held or enjoyed the same; and, further, the said purchaser or purchasers shall have and be entitled to hold the said railroads and property free and discharged of and from the lien of the mortgage foreclosed in this suit, and from the claims of the parties to this suit, or any of them, except the said first consolidated mortgage of September 1, 1884.

All questions not hereby disposed of and determined are hereby reserved for future adjudication, the settlement of the same being held not to be necessary for the purposes of this decree, and the court reserves the right to make such further order at the foot of this decree as may seem just and proper.

N. GOFF,
Circuit Judge.

May 2nd, 1894.
Filed in this office May 5th, 1894.

H. C. COWLES, *Clerk.*

175 Circuit Court of the United States, Western District of North Carolina.

CENTRAL TRUST COMPANY OF NEW YORK
against
WESTERN NORTH CAROLINA R. R. Co. and Others. } In Equity.

Special Master's Report of Sale.

The undersigned, Charles Price, heretofore appointed as special master under a final decree of foreclosure and sale entered by this court in the above-entitled cause, on the 5th day of May, 1894, reference being thereto had, respectfully reports to the court:

Pursuant to the directions of said decree, I caused a notice to be published once in each week for the term of thirteen weeks preceding the day of sale, in three weekly newspapers published in the

State of North Carolina, beginning at least ninety days before the day fixed for such sale, viz.: in the Raleigh News and Observer, a weekly newspaper, published in North Carolina; in the Salisbury Herald, a weekly newspaper, published in North Carolina; and in the Statesville Landmark, a weekly newspaper, published in North Carolina, that I would, on Tuesday, the 21st day of August, 1894, or the day to which I should adjourn such sale, at 11 o'clock a. m., at the passenger station of the Western North Carolina Railroad Company, in Statesville, North Carolina, offer for sale, upon the terms and conditions thereinafter set forth, all and singular the line of railroad, equipment, property and franchises described in such decree as the property of the Western North Carolina Railroad Company covered by its second mortgage of September 2, 1884, and by said court ordered to be sold under the foreclosure of said mortgage and included in said notice (of which a copy marked "Schedule
176 A," is hereunto annexed, forming part of this report), a general description of such property to be sold and the terms and conditions of such sale.

At eleven o'clock a. m. on Tuesday, the 21st day of August, 1894, I attended at the passenger station of the Western North Carolina Railroad Company, in Statesville, North Carolina, and then and there, as required by such decree, did offer for sale at public auction to the highest bidder or bidders, as an entirety and in one parcel, the railroad, property and franchises in said decree directed to be sold, viz:

All and singular the railroad of the said Western North Carolina Railroad Company in the State of North Carolina, extending from Salisbury, in Rowan county, to and through Statesville, in Iredell county, to Asheville, on or near the French Broad river, in Buncombe county; thence along the French Broad river to Paint rock, in Madison county, and also from said Asheville westward to the Tennessee river, at or near the mouth of the Nantahala river, and thence westward to Murphy, in Cherokee county; and all real estate now owned or acquired for the purposes of said railroad, including all station, depot or other grounds held and used in connection therewith; and all rails, railway tracks, sidings, switches, bridges, fences, turn-tables, water tanks, viaducts, culverts, superstructures, passenger and other depots, station and freight houses, machine shops, buildings, fixtures, rolling stock, equipment, machinery, tools and implements whatsoever, now owned or acquired for the purposes or business of the said Western North Carolina Railroad Company in connection with the said railroad; and all the franchises, rights, privileges, easements, incomes, earnings, and profits of the said Western North Carolina Railroad Company connected with, issuing from or relating to the said above-described railroad.

And the highest and best bid for said property, when so offered by me, was made by the Southern Railway Company, a railroad corporation created and existing by virtue of the act of
177 assembly of the Commonwealth of Virginia, entitled "An act authorizing the purchasers of the Richmond and Danville

railroad, their assigns and successors, to become and be a corporation, to adopt a name therefor and possess and exercise general powers, and authorizing the leasing to or by, and the consolidation therewith of other corporations," approved February 20, 1884, and the said Southern Railway Company did offer and bid for such property the sum of five hundred thousand dollars ($500,000) and as such bidder, as required by the said decree, did deposit with me as special master, at the time of making such bid, the sum of fifty thousand dollars ($50,000) in certified check as a pledge that such bidder would make good its bid if accepted by the court.

And thereupon I did strike off the whole railroad, property and franchises described in the said decree, and ordered to be sold to the said Southern Railway Company for its said bid of five hundred thousand dollars, ($500,000) and took from it the memorandum of sale hereunto annexed and forming part of this report, marked "Schedule B."

I hold subject to the court's order the fifty thousand dollars ($50,000) cash paid over to me by such purchaser on its bid.

Dated Statesville, N. C., August 21, 1894.

CHAS. PRICE,
Special Master.

Advertisement of Sale—Schedule A.

Western North Carolina Railroad Company.

Notice is hereby given that, in pursuance of a decree of the circuit court of the United States for the western district of North Carolina, entered May 5th, 1894, in the suit of the Central Trust Company of New York against the Western North Carolina Railroad Company and others, I, the subscriber, special master, thereby designated, will on the 21st day of August, 1894, or the day to which I may adjourn the sale, at 11 o'clock in the forenoon, at the passenger station of the Western North Carolina Railroad Company at Statesville,
178 North Carolina, sell at public auction to the highest bidder or bidders, as an entirety, and in one parcel, the following-described railway and property, viz.:

All and singular the railroad of the said Western North Carolina Railroad Company in the State of North Carolina, extending from Salisbury, in Rowan county, to and through Statesville, in Iredell county, to Asheville, on or near the French Broad river, in Buncombe county; thence along the French Broad river to Paint Rock, in Madison county, and also from said Asheville westward to the Tennessee river, at or near the mouth of the Nantahala river, and thence westward to Murphy in Cherokee county; and all real estate now owned or acquired for the purposes of said railroad, including all station, depot or other grounds held and used in connection therewith; and all rails, railway tracks, sidings, switches, bridges, fences, turn-tables, water tanks, viaducts, culverts, superstructures, passenger and other depots, station and freight houses, machine shops, buildings, fixtures, rolling stock, equipment, machinery, tools

and implements whatsoever, now owned or acquired for the purposes or business of the said Western North Carolina Railroad Company in connection with the said railroad; and all the franchises, rights, privileges, easements, income, earnings and profits of the said Western North Carolina Railroad Company connected with, issuing from or relating to the said above-described railroad.

No bid therefor will be accepted from any bidder for a sum less than $500,000, nor from any bidder who shall not place in the hands of the special master, or deposit with him at the time of making the bid, as a pledge that such bidder will make good his bid if accepted by the court, the sum of $50,000 in money or certified check, or in bonds secured by the mortgage of the Western North Carolina Railroad Company to the Central Trust Company of New York, dated September 2, 1884, taking the same at par of their principal.

Of the price for which said property shall be sold there shall be paid in cash, at the time of sale, the cash deposit hereinbefore required, which shall be received as a part of the purchase price, and also at the same time, and from time to time thereafter, such further portions of said purchase price shall be paid in cash as the court may direct, in order to meet the expenses of this suit, and to pay such claims, if any, against the mortgaged property as
179 the court may adjudge to be prior in equity to the said mortgage of September 2, 1884. The court reserves the right to reject any bid, and to resell said premises and property, upon failure of any purchaser for twenty days to comply with any order of the court requiring payment. The balance of the purchase price, not required to be paid in cash, may either be paid in cash or the purchaser may satisfy and make good such balance of his bid, in whole or in part, by paying over and surrendering outstanding bonds secured by said mortgage of September 2, 1884, said bonds being received at such price or value as shall be equivalent to the amount that the holders thereof would be entitled to receive thereon in case the entire purchase price were paid in cash.

If any bid shall be accepted by the court, and the person making the same shall fail to comply with the conditions of sale and all orders of the court in respect threto, the sum deposited by the bidder shall be forfeited, and shall be applied as the court may direct.

The purchaser or purchasers at said sale shall, as part of the consideration of said sale, take the property purchased upon the express condition that he or they, or his or their assigns, approved by the court, will pay off and satisfy any and all claims filed in the above-mentioned suit, but only when the court shall allow such claims and adjudge the same to be prior in lien to the said mortgage of September 2, 1884, and in accordance with the order or orders of the court allowing such claims and adjudging with respect thereto, and the purchaser or purchasers, or their approved assigns, shall be entitled to appeal from any and all orders or decrees of the court in respect to such claims or any of them, and shall have all the rights in respect to such appeals which the complainant Central Trust Company of New York would have in case such

appeals have been taken by it. The purchaser or purchasers at said sales shall also, as part of the consideration, in addition to the payment of the sum or sums bid, take the property purchased upon the express condition that he or they, or his or their assigns, approved by the court, will pay off and satisfy all the debts or obligations incurred or to be incurred by the receivers having possession of such property, which have not been or shall not be paid by said receivers, and which shall not be adjudged by the court to be debts or obligations properly chargeable against the property pur-
180 chased and to be prior or superior to the lien of said mortgage of September 2, 1884. The court reserves the right to retake and resell said property in case of the failure or neglect of the purchaser or purchasers, or his or their assigns, approved by the court, as aforesaid, to comply with any order of the court in respect to payment of prior lien claims above mentioned, within twenty days after service of a copy of such order upon such purchaser or purchasers, or his or their assigns.

The purchaser or purchasers at said sale shall not be required to assume or adopt any leases of any railway or railways owned or held by the railroad company as lessee, but shall have the right to elect whether or not to assume or adopt the same, or any thereof.

The said property is sold subject to the lien of the first consolidated mortgage of the Western North Carolina Railroad Company to the Central Trust Company of New York, as trustee, dated September 1, 1884, under which mortgage bonds have been issued and are now outstanding to the amount of $3,856,000.

Upon confirmation of said sale and completion of the purchase by the purchaser or purchasers, said purchaser or purchasers will be entitled to receive from the special master a deed or deeds of the property sold, and also to receive good and sufficient deeds of conveyance or evidence of transfer of any and all property sold which is vested in or standing in the name of the receivers, or to which said receivers have in any manner acquired title, and also to receive a deed or deeds of assurance, to be executed in accordance with law by the Western North Carolina Railroad Company.

For further particulars, and for a more specific description of the property to be sold, reference is hereby made to the said decree, on file with the clerk of the court hereinbefore mentioned.

Dated May 12th, 1894.

CHARLES PRICE,
Special Master.

BUTLER, STILLMAN & HUBBARD,
Solicitors for Complainant, 54 Wall St., New York.

May 17, 1894.

181 Circuit Court of the United States, Western District of North Carolina.

CENTRAL TRUST COMPANY OF NEW YORK
against
WESTERN NORTH CAROLINA RAILROAD COMPANY. } In Equity.

Memorandum of Sale—Schedule B to Report of Special Master.

Having reference to the foreclosure decree specified in the foregoing notice of sale published by the special master appointed in the above-entitled cause, the undersigned, the Southern Railway Company, as thereunto duly authorized by law, hereby acknowledges that it has purchased at public auction from Charles Price, the special master of such court, all the railroad, equipment, property and franchises of the Western North Carolina Railroad Company, as described in the annexed decree and advertisement of sale, as offered and sold by him as a unit and a single parcel, at and for the sum of five hundred thousand dollars ($500,000), and the said Southern Railway Company hereby promises and agrees with such special master, if such sale is confirmed, fully to pay and discharge the sum so bid by it for such property, in accordance with the decree, and in all things to comply with the terms and conditions of such sale and such orders as the court has already or may hereafter enter to enforce the purchase of such property by it under the provisions of such decree.

In witness whereof, the Southern Railway Company has caused these presents to be executed in its behalf by its agent thereunto duly authorized, this 21st day of August, 1894.

SOUTHERN RAILWAY COMPANY,
By S. SPENCER, *President.*

Attest: —— ——, *Secretary.*

Filed in this office August 21st, 1894.

H. C. COWLES, *Clerk.*

182 Circuit Court of the United States, Western District of North Carolina.

CENTRAL TRUST COMPANY OF NEW YORK
against
WESTERN NORTH CAROLINA R. R. Co. and Another. } In Equity.

Motion of Purchaser to Confirm Special Master's Sale.

Your petitioner, The Southern Railway Company, a corporation organized and existing under the laws of the State of Virginia, having this day become the accepted bidder and purchaser at the sale by the special master of all the railroad, equipment, property and fran-

chises of the Western North Carolina Railroad Company, ordered to be sold by the final decree rendered herein on May 5, 1894, respectfully shows to the court:

That the special master has this day filed his report of sale made by him of the said railroad, property and franchises, showing full compliance with the decree of this court in respect to his duty as to such sale, and in his report has shown to the court that the undersigned was the highest and best bidder for all such railroad, property and franchises, when offered and sold as a single parcel, at and for the sum of five hundred thousand dollars ($500,000,) and that all such railroad property and franchises were by the said special master struck off to the undersigned on such bid as the highest and best bidder therefor.

Petitioner, as such purchaser, has paid over to the special master, on its accepted bid, the sum of fifty thousand dollars ($50,000) in money, and has fully complied with the terms of such decree and sale so far as now obligatory upon it, and is upon the said report entitled to a confirmation thereof.

The undersigned, as such purchaser, owns and holds in possession $4,110,000 bonds secured by the second mort-
183 gage of the Western North Carolina Railroad Company, dated September 2, 1884, being the entire issue of such bonds.

The undersigned is ready and willing fully to complete its purchase and to make payment of its said bid and to comply with the court's further orders now and hereafter to be entered in that behalf, according to the terms of the decree.

And, accordingly, the said Southern Railway Company hereby gives notice that upon the 22nd day of August, 1894, at 4 o'clock p. m., or as soon thereafter as counsel can be heard, it will apply to the circuit court of the United States for the western district of North Carolina, at Salisbury, N. C., for an order and decree that the report of the said special master be confirmed, and that the petition of the said Southern Railway Company for such confirmation be granted, and that the special master and the complainant be directed forthwith to execute and deliver a proper deed or deeds to the Southern Railway Company as purchaser of the property mentioned in said decree of foreclosure.

THE SOUTHERN RAILWAY COMPANY,
By S. SPENCER, *President.*

FRANCIS LYNDE STETSON,
HENRY CRAWFORD,
Of Counsel.

Filed in this office August 21st, 1894.

H. C. COWLES, *Clerk.*

184 Circuit Court of the United States, Western District of North Carolina.

CENTRAL TRUST COMPANY OF NEW YORK
vs.
WESTERN NORTH CAROLINA RAILROAD COMPANY and Another. } In Equity.

Decree Confirming Sale.

Now, on this August 22, 1894, come again the parties by their respective solicitors, and comes also the purchaser, Southern Railway Company, a corporation of Virginia, and its petition that the report of the special master filed herein on August 21, 1894, should be approved, and the sale to it of the railroad, property and franchises of the Western North Carolina Railroad Company, as described in said decree, should be confirmed and made absolute, came on to be heard;

And it appearing by the report of the special master that such purchaser has fully complied with the directions of said decree as to the sale of the said property and that such purchaser was the highest and best bidder for such railroad, property and franchises, and that the same was struck off to it for the sum of five hundred thousand dollars ($500,000,) subject, however, as recited in said decree, to the mortgages, receivers' debts and other preferential liens and claims, and to all and singular the terms and conditions in said decree set forth, and that such purchaser has made the payment thus far obligatory upon it, it being shown to the satisfaction of the court that the recitals in the report of the special master are true, and no cause being shown against such report;

And it further appearing to the court that, besides the said cash payment made by the said purchaser, it has also delivered to the special master for and on account of its bid $4,110,000 in bonds of the Western North Carolina Railroad Company, secured by
185 its second mortgage, dated September 2, 1884, to the Central Trust Company of New York:

Thereupon the court orders and decrees that the said report of the special master be spread at large upon the record and be in all things approved, and the sale made by him to the said Southern Railway Company, being all and singular the railroad, equipment, property and franchises of the Western North Carolina Railroad Company as described in and by the decree of foreclosure entered in this cause on May 5, 1894, at and for the sum of five hundred thousand dollars ($500,000) by it bid, be and the same is in all things ratified, approved, confirmed and made absolute, subject, however, to all the mortgages, receivers' debts and preferential claims, and to all equities reserved, and to all and singular the conditions of purchase as recited in said decree, and the continued right of the court to adjudge and declare what receivers' or corporate debts are prior in lien or in equity to the lien of the mortgage herein foreclosed or

ought to be paid out of such proceeds of sale in preference to the bonds secured thereby. And this court expressly reserves for future adjudication, and power thereby to bind the property sold, all liens and claims and equities specified in and reserved by the said final decree of foreclosure so as aforesaid entered on May 5, 1894.

And the court accepts the said Southern Railway Company as the purchaser of all and singular the railroad, property and franchises sold under the decree in this cause and holds it obligated as such purchaser to complete and fully pay its said bid and to comply with all the orders of the court heretofore entered, or hereafter from time to time to be entered by it obligatory on such purchaser.

And the court further reserves full power from time to time to enter orders finding upon the said Southern Railway Company, as such purchaser, under its decree, requiring it to pay into the registry of this court all such sums as have been, or may be ordered by this court, for the payment of any and all receivers' debt or claims adjudged, or to be adjudged, by it as prior in lien or equity
186 to the mortgage foreclosed in this cause, or entitled to preference in payment out of the proceeds of sale prior to such mortgage bonds.

It is further ordered and decreed that the special master is hereby authorized and directed, on the request of said purchaser to sign, seal, execute, acknowledge and deliver a proper deed of conveyance to the said Southern Railway Company, conveying to it all and singular the railroad, equipment, property and franchises so as aforesaid sold under the decree of this court, free from any and all equity of redemption of the said Western North Carolina Railroad Company, or any one claiming by, under or through it, except the prior mortgages recited in such decree. Upon the delivery of such conveyance by the special master the said Southern Railway Company shall fully possess and be invested with all of the estate, right, title and interest in, to and of such railroad, equipment, property and franchises so sold under the decree of this court as the absolute owner thereof, to have and hold the same to it and its successors and assigns forever. In order to facilitate the recording thereof four counterparts of such deeds may be executed, acknowledged and delivered by the special master, all or any one or more of which may be recorded, and any one or more of such counterparts when executed, acknowledged and delivered shall severally or collectively be deemed to be an original, and for all intents and purposes constitute a single instrument.

On August 31st, 1894, on exhibition of the deed executed and delivered by the special master herein ordered, the defendant company is authorized, directed and required forthwith to deliver over to the said Southern Railway Company the possession of all and singular the railroad and property described in and conveyed by such deed.

It is also further ordered that by way of further assurance and confirmation of title to such Southern Railway Company of the property so by it purchased under the decree of this court, the said

Western North Carolina Railroad Company, by its proper
187 officers and under its corporate seal, and the Central Trust Company of New York, trustee, shall, upon request of said Southern Railway Company, sign, seal, execute, acknowledge and deliver to said Southern Railway Company all proper deeds of conveyance, transfer, release and further assurance of all the railroad, property and franchises so as aforesaid sold under the decree of this court, and embraced in the deed of the special master, so as fully and completely to transfer to and invest in the said Southern Railway Company the full, legal and equitable title to all such railroad, property and franchises sold or intended to be sold under the decree of this court.

The court reserves full power, notwithstanding such conveyance and delivery of possession, to retake and resell the property this day confirmed to such purchaser, if it fails or neglects fully to complete such purchase and comply with the orders of court in respect to the full payment and performance of its bid, or to pay into court in accordance with such decree of sale all such sums of money hereafter ordered by the court to be paid into its registry to discharge any and all such debts, liens or claims as it may decree ought to be paid out of the proceeds of sale in preference to the mortgage of the Western North Carolina Railroad Company herein foreclosed.

The special master shall deposit the cash paid to him by the purchaser in the Davis & Wiley Bank of Salisbury, North Carolina, to abide the further order of the court herein, and shall deposit to his order in the Central Trust Company of New York all the bonds paid over to him by the purchaser, so that the same may be stamped with the credit or payment on account thereof upon such bid after the amount thereof shall be adjudged by the court, such bonds, coupons and scrip thereafter to be returned to the said purchaser.

CHARLES H. SIMONTON,
U. S. Circuit Judge.

August 22nd, 1894.

Filed in this office August 22nd, 1894.

H. C. COWLES, *Clerk.*

188 UNITED STATES OF AMERICA, }
Western District of North Carolina. }

Circuit Court, Fourth Circuit.

I, H. C. Cowles, clerk of the circuit court of the United States in and for the western district of North Carolina, at Charlotte, in the said district, do hereby certify the foregoing to be a full, true and complete transcript of the record and proceedings in the case of Central Trust Company of New York, complainant, against The Western North Carolina Railroad Company and another, defendants, as fully as the same remain on file and of record in my office.

In witness whereof, I hereunto subscribe my name and affix the seal of the said court, at office, this the 4th day of May, A. D. 1897.

H. C. COWLES, *Clerk.*

189 This indenture made and entered into this, the first day of September, in the year one thousand eight hundred and eighty-four, between the Western North Carolina Railroad Company, a corporation created and organized under the laws of the State of North Carolina, party of the first part, and the Central Trust Company of New York, trustee, party of the second part, witnesseth: That, whereas, the General Assembly of the State of North Carolina, on the twenty-ninth day of March, A. D. 1880, passed and ratified an act entitled "An act to provide for the sale of the State's interest in the Western North Carolina Railroad Company, and for other purposes" and to which, reference is hereby made for more specific recital of its provisions; and, whereas, the commissioner designated in and appointed by said act on the part of the said State, did, on the twenty-seventh day of April, A. D. 1880, in pursuance of sections one, two and three, of said act, execute a conveyance to William J. Best, William R. Grace, James D. Fish and J. Nelson Tappan, as grantees of all the right and interest of the State in and to the said Western North Carolina Railroad Company, and which said instrument of conveyance was on the third day of May, A. D. 1880, duly deposited with the United States Trust Company of New York, as an escrow, in pursuance of and upon the conditions specified in said section two of said act; and whereas, the said instrument of conveyance, as required by said section three of said act, expresses upon its face that the said transfer and sale is "subject" only to a mortgage deed of the aggregate amount of eight hundred and fifty thousand dollars, and mortgage bonds "of equal amount issued thereon, which said mortgage was" executed under and by authority of an act of the General Assembly of North Carolina, entitled "An act in relation" to the Western North Carolina Railroad Company, ratified the 13th day of March, 1875; and, whereas, on the twenty-seventh day of April, A. D. 1880, the above-named grantees executed and delivered to the said commissioner a written contract under seal signed
190 by themselves, containing all the stipulations mentioned in sections five and twenty-one of said act; and, whereas, the said company was duly reorganized in accordance with section eight of said act as a new corporation by the name of the "Western North Carolina Railroad Company," and which said *recognized* company is the party of the first part hereto; and, whereas, it is provided by section nine of said act "that after its reorganization, said company may execute and deliver mortgage deeds with power of sale, to such trustee or trustees as may be selected by the board of directors, conveying the railroad property and franchises, including road-beds, superstructure, equipment and all the real and personal estate of said company to secure the payment of such bonds and the interest thereon, as the same shall become due, as it may issue to aid in the construction, completion and equipment of said railroad; and said mortgage deeds, when duly executed, may be recorded in the register's office, in Rowan county, and their registration in that county shall be an effectual and sufficient registration for all purposes, and it shall not be necessary to register the same in any other county, any law to the contrary notwithstanding: Provided, that *in* sale

under the mortgage deeds herein authorized shall be made by virtue of any decree of foreclosure, or of any power of sale contained herein, without giving ninety days' notice thereof in three newspapers published in the State of North Carolina; "and, whereas, the said Western North Carolina Railroad Company, after its said reorganization, to secure the payment of the principal and interest of its coupon bonds of one thousand dollars each, numbered from one (1) up consecutively to the amount of fifteen thousand dollars for each mile of road, as the same may be finished and ready for operation," did, on the fifteenth day of June, A. D. 1881, in accordance with sections nine, ten, eleven and twelve of the said act of March 29th, 1880, execute and deliver its first-mortgage deed to Joseph Bryan and James H. Dooly, as trustees, thereby conveying to them, the said trustees, all its right, title and interest and estate in and to the said Western
191 North Carolina railroad, its property and franchises, including road-bed, superstructure, equipment and all its real and personal property which said company now owns, or which it may hereafter acquire together with all its net income, revenues and profits; and, whereas, the said mortgage deed contained the following proviso and condition, viz: Provided, however, that this mortgage cannot be foreclosed for either principal or interest until said Western North Carolina railroad shall have been completed to Paint Rock and Murphy as provided by section ten of the act of the General Assembly hereinbefore referred to, to wit: the said act of March 29th, 1880, which said proviso and condition greatly incumbered and impaired the value of the bonds secured by said mortgage deed, and, whereas, the General Assembly of the State of North Carolina at its regular session of 1883, and on the sixth day of March, 1883, passed and ratified an act entitled "An act to amend an act to provide for the sale of the State's interest in the Western North Carolina Railroad Company and for other purposes," by the second section whereof it is provided that if the said Western North Carolina railroad be completed and in operation to the Tennessee river at or near the mouth of the Nantahala river, in a manner acceptable to the commissioners named in said act of March 29th, 1880, on or before the first day of September, 1884, and shall, on or before the first day of May, 1884, have purchased from the treasury of the State five hundred and twenty thousand dollars of bonds deposited with him under the provisions of sections twelve and twenty-four of the said act of March 29th, 1880, and shall have kept continuously at work a force of at least seventy-five convicts on the line of the road from the mouth of the Nantahala river westward to Murphy to which said section two reference is hereby made for a more specific recital of said provision and condition, then the said Western North Carolina Railroad Company shall have full authority to make and execute mortgage deeds and bonds which need not contain
192 the words "That the mortgage cannot be foreclosed for either principal or interest until said railroad shall have been completed to Paint Rock and Murphy, as provided in section ten of said act of March 29th, one thousand eight hundred and eighty," and said

company is also authorized and empowered to declare the said proviso in the mortgages already executed and the bonds issued thereon to be null and void; and, whereas, the Western North Carolina Railroad Company, party of the first part hereto, has fully complied with all the requirements and conditions of the aforesaid section two of said act of March 6th, 1883; and, whereas, the said party of the first part being now authorized and desirous to avail itself of the right and permission conferred by the said section 2 of said act of March 6th, 1883, of making and executing this present mortgage deed, and the bonds issued thereon, without causing to be expressed therein the words "That this mortgage cannot be foreclosed for either principal or interest until said railroad shall have been completed to Paint Rock and Murphy" with the view of substituting this present mortgage, and the bonds issued thereon for and — place of its certain said mortgage deed and the bonds issued thereon dated the 15th day of June, A. D. 1881, which do contain the said words, as hereinbefore recited, and such omission of the said words from the face of this present mortgage deed and the bonds issued thereon, and such substitution, being deemed preferable to exercising the power and authority conferred by said section two "to declare the proviso in the mortgage already executed and the bonds issued thereon, to be null and void;" and, whereas, by the provision of sections five and seven of said amendatory act of March 6th, 1883, the said Western North Carolina Railroad Company is "authorized and empowered to construct, equip and operate two" branch roads, to wit: the one starting at some point on "the main line between Charleston, in Swain county, and the mouth of the Nantahala river and running thence to the North Carolina and Tennessee line in the direction" of Maryville, Tennessee; the other starting at a point on the main line
193 in the vicinity of the mouth of the Nantahala river, and running thence up the Tennessee river by Franklin, in the direction of Clayton in Georgia "and to mortgage these branch roads and issue bonds thereon for the purpose of raising money to complete and equip the same;" and, whereas, it is deemed to be more to the benefit and advantage of both the said party of the first part and the holders of its said bonds that the issue of bonds on this present mortgage deed should be restricted to the amount of twelve thousand dollars for each mile of road instead of the amount of fifteen thousand dollars for each mile as provided in said mortgage dated the 15th day of June, 1881, and to include in this present mortgage, and the objects and purposes of the trust herein created and expressed, the said two branch roads authorized to be constructed, equipped and mortgaged by the said Western North Carolina Railroad Company as the said sections five and seven of said act of March 6th, 1883, *and* hereinbefore recited, and all other and different branch roads, and extensions, additions or increase of main line of road and other property which is now or may hereafter be held, control-ed or acquired by the said Western North Carolina Railroad Company with power to mortgage the same; and, whereas, the said Western North Carolina Railroad Company for the purpose

of providing the necessary funds "to aid in the construction, completion and equipment of said railroad," branch roads and extensions, has duly determined to issue its coupon bonds, with privilege of registration, of one thousand dollars each, numbered from one up, consecutively to the amount of twelve thousand five hundred dollars for each mile of road, branch roads and extensions as the same may be "finished and ready for operation," said bonds to run for a period of thirty years and bear interest at the rate of six per centum per annum payable semi-annually, in the city of New York, on the *first day of January and July in* each year from the first day of January, 1881, in accordance with the conditions and requirements of section eleven of said act of March 29th, 1880, and to be in form as follows, to wit:

194 UNITED STATES OF AMERICA, *State of North Carolina*

$1,000. No. —. $1,000.

Western North Carolina Railroad Company First Consolidated Mortgage, Six per Cent.

Know all men by these presents: That the Western North Carolina Railroad Company, a corporation created by and organized under the laws of the State of North Carolina, for value received, hereby acknowledges itself indebted and promises to pay to the Central Trust Company of New York, or the bearer hereof, in accordance with the conditions as to registration hereinafter mentioned, the sum of one thousand dollars in gold coin of the United States of America, payable at the financial agency of said company in the city of New York and United States of America, on the first day of January, A. D. 1914, with interest thereon in like coin at the rate of six per centum per annum, payable semi-annually from the first day of January, A. D. 1881, on or about the first day of January and the first day of July of each and every year, on the presentation and surrender of the proper interest coupon hereto attached.

This bond is one of the series of bonds of like tenor and effect issued and to be issued for the purpose of completing said railroad and branch roads to an aggregate amount not exceeding the sum of twelve thousand five hundred dollars per mile for each mile of road as the same may be finished and ready for operation, the payment of which with the interest as aforesaid is secured by a mortgage bearing even date herewith duly executed by said obligor and delivered to the Central Trust Company of New York as trustee for the holders of said bonds conveying all the main and branch lines of railroad of said obligor now or hereafter to be completed or acquired, and the franchises, property, road-beds, superstructure, equipments, and all real and personal estate of said company as specified in said mortgage. Bonds of this series to the amount of $850,000 in all are reserved by the said trustee for the sole
195 purpose of taking up, exchanging, or providing for the payment of outstanding bonds to said amount issued under a mortgage deed executed by commissioners of the State of North

Carolina under the provisions of an act of the General Assembly of said State, passed and ratified March 13th, 1875, and said bonds thus exchanged or paid are to be cancelled and said mortgage satisfied so that this mortgage shall become and be the first mortgage upon all the property of the said Western North Carolina Railroad Company. If default in the payment of interest on this bond be made and continue six months, after due demand, the principal hereof, at the option of the said trustee, subject to the control of the holders of a majority in interest of said bonds then outstanding shall become due as provided in said mortgage.

This bond is accepted subject to the condition that it shall be transferable by delivery except when registered upon the books of the company in the name of the owner and such registry endorsed thereon, such registered owner may at any time make the same transferable by delivery by having it registered, as aforesaid, payable to bearer, the interest coupon shall remain transferable by delivery notwithstanding registration of the bonds to which the same are attached. This bond shall not be valid unless the certificate endorsed hereon shall be signed by said trustee.

In witness whereof the said Western North Carolina Railroad Company has caused this bond to be signed by its president and sealed with its corporate seal, attested by its secretary, this first day of September, A. D. 1884.

—— ——, *President.*

Attest: —— ——, *Secretary.*

Interest Coupons.

$30. No. —. $30.

The Western North Carolina Railroad Company will pay to the bearer hereof on the first day of January, 18—, thirty dollars in gold coin of the United States of America, at its financial agency in the city of New York, being six months' interest due that day on its first consolidated mortgage bond, No. —.

—— ——, *Treasurer.*

196 *Trustee's Certificate.*

The Central Trust Company of New York hereby certifies that the within bond is one of the series of bonds issued under the deed of trust therein referred to.

By —— ——, *President.*

Registration.

Date of registry — —— ——.
In whose name registered —— ——.

—— ——, *Registrar.*

And, whereas, the Western North Carolina Railroad Company is authorized and empowered by section nine of the aforesaid act of March 29th, 1880, and section seven of the aforesaid act of March 6th,

1883, to execute and deliver mortgage deeds to secure the payment of bonds and interest thereon, as the same shall become due; and, whereas, by section ten of said act of March 29th, 1880, the issuance of bonds under the first of said mortgage deeds is restricted to the amount of fifteen thousand dollars per mile for each mile of road finished and ready for operation, and it is by said section "Provided, that until the eight hundred and fifty thousand dollars of bonds now outstanding shall have been paid, the aggregate of bonds authorized to be issued as provided in this section, shall be less than the amount named above by the sum of eight hundred and fifty thousand dollars, and neither by this act nor by the contract to be made by authority hereof shall the first lien of the mortgage now upon said road as security for said bonds be affected or impaired;" and, whereas, the said mortgage is still existing in full force and the said bonds to the amount of eight hundred and fifty thousand dollars are unpaid and outstanding, and it is intended to take up and satisfy the same by the use of bonds secured by this present mortgage to the end that the same may become and be the first mortgage upon all the property of the said Western North Carolina Railroad Company; and, whereas, as authorized to do by law,
197 the board of directors of said company have determined that the said bond and mortgage be in the form herein contained, and that this mortgage, and each of said bonds, be sealed with the corporate seal of said company, and signed by its president and attested by its secretary; and that the said bonds when so sealed and executed be certified and countersigned on the back *of* the said trustee which said certification and countersigning shall be the only proof that the said bonds have been issued by the party of the first part or secured by this indenture. Now, therefore, this indenture further witnesseth, that in consideration of the premises and of the sum of one dollar in hand paid by each of the parties hereto to the other, the receipt whereof is hereby acknowledged, it is hereby covenanted and agreed by and between the Western North Carolina Railroad Company, party of the first part, and the Central Trust Company of New York, party of the second part, as follows: First, this mortgage shall be security for the whole or any part of the amount of the bonds authorized to be issued as herein aforesaid, which shall be issued hereunder at any time while this mortgage remains in force, and in case the whole amount of bonds herein authorized shall not be issued, this mortgage shall be security for such portion thereof as shall be issued, and all bonds issued hereunder, shall be equally secured by this mortgage without regard to the time when the same may be issued. Second, the party of the first part covenants and agrees to pay to the lawful holders of the bonds hereby secured the principal and interest therein agreed to be paid, at the times and upon the terms therein mentioned upon the surrender of said bonds or of the interest coupons thereto attached. Third, the party of the first part covenants and agrees to pay all taxes and assessments upon the premises and property hereby granted and conveyed, and to keep and maintain the said railroads and property in good condition and order, and also on being requested so to do to pay all proper

charges of the said trustee hereunder, and all reasonable
198 disbursements made by it in the performance of its duty as said trustee. Fourth, the party of the first part covenants and agrees to keep an agency in the city of New York, and at each agency to keep an appropriate book, to be designated "Register of First Consolidated Mortgage Bondholders" for the purpose of registration and transfer of the bonds secured hereby in accordance with the terms expressed in such bonds, and any and every holder of said bonds shall be entitled to have his name and address, and the number of any such bonds, held by him, entered therein upon presenting at said agency a written statement of those particulars signed by himself, and upon duly verifying his title to such bonds by the production thereof, and personal identification when required, or upon written order, duly verified, of the person last registered as the owner. Such registration shall authenticate the title of the holder of every bond so registered to act in the matter of the administration of the trust hereby created, and after such registration no transfer, except upon said transfer book, shall be valid either as to the trustee or otherwise, unless the last registration shall have been to bearer, and each bond shall continue subject to successive registrations and to transfers to bearer, at the option of the owner. But such registration shall not restrain the negotiation, at all times, of the interest coupons attached to such bonds by delivery merely. The said trustee shall have free access to said register at all reasonable times and shall, from time to time, on request in writing be furnished with a copy thereof. And in further consideration of the premises and of the sum of one dollar to it in hand paid by the Central Trust Company of New York, the receipt whereof is hereby acknowledged, and in order to secure the payment of the principal and interest of the bonds issued hereunder according to the terms thereof, without preference or priority by reason of the time of issue, and equally and ratably the said Western North Carolina Railroad Company hath granted, bargained, sold, assigned, transferred and conveyed and
hereby doth grant, bargain, sell, assign, transfer and convey
199 unto the Central Trust Company of New York and its successor or successors in the trust hereby created, and its and their assigns, the following-described real and personal property, that is to say: All and singular the railroad and branch railroads of the Western North Carolina Railroad Company, party of the first part hereto, constructed and authorized to be constructed in the State of North Carolina and being its main line of railroad extending from Salisbury, in Rowan county, to and through Statesville, in Iredell county, to Asheville, on or near the French Broad river, in Buncombe county, thence along the French Broad river to Paint Rock, in Madison county, and from said Asheville westward to the Tennessee river, at or near the mouth of the Nantahala river, and thence westward to Murphy, in Cherokee county; and also the branch line of railroad starting at a point on said main line between Charleston, in Swain county, and the mouth of the Nantahala river, and running thence to the North Carolina and Tennessee line in the direction of Maryville, Tennessee; and also the branch line starting at a point

on said main line in the vicinity of the mouth of the Nantahala, and running thence up the Tennessee river by Franklin in the direction of Clayton, in Georgia; and any and all branches, additions or extensions of said railroads or either of them, and any and all real estate now owned or hereafter acquired for the purpose of said railroads, branches, additions or extensions, or either of them including the right of way for said branches, additions or extensions, the road-bed of said railroads above described and said branches, additions or extensions and the superstructure and tracks placed thereon, and all stations, depot and other grounds now held and used or hereafter acquired, held and used in connection therewith; and all rails, railways, tracks, sidings, switches, bridges, fences, turn-tables, water tanks, viaducts, culverts, passenger and other depots, station-houses, freight-houses, machine shops and other structures, buildings and fixtures whatsoever, now owned or hereafter acquired, for the use of the said party of the first part or the business
200 thereof, or for the construction, maintenance and operation of said lines of railroad or branches, additions and extensions thereof or thereto, hereby conveyed, or either of them; together with all rolling stock, equipment, machinery, tools and implements of said party of the first part now owned or hereafter to be acquired by it; and all the real estate and chattels real of said party of the first part, wherever the same may be situated in said State of North Carolina, and whether now held and owned, or hereafter to be acquired by it, for the purpose of said railroads, branches, additions or extensions, or either of them; and all the corporate franchises, rights, privileges, income, earnings and profits of the said party of the first part, now possessed or which may be hereafter acquired by it connected with, issuing from or relating to the said railroads, branches, additions or extensions, as aforesaid, or any of them or the construction, maintenance, use or enjoyment of the same or any thereof; and all the ways, passages, water-courses, easements, rights, privileges, liberties, hereditaments and appurtenances whatsoever unto any of the hereby granted and mentioned premises and estates belonging or appertaining or hereafter to belong or appertain, and all the estate, right, title, interest, property, claim and demand of any nature and kind whatsoever of the said party of the first part, now owned and possessed or which may be hereafter acquired, owned and possessed, as well at law as in equity of, in and to the same and every part and parcel thereof, to have and to hold the said above-described premises, property, franchises, rights, privileges and appurtenances unto the said party of the second party, its lawful successor or successors and assigns forever and to its and their only proper use and behoof, in trust, nevertheless, for the equal *pro rata* benefit and security of all the holders of the bonds secured hereby without any preference or priority by reason of priority in time of issue or negotiation thereof, and for the objects, uses and purposes hereinafter declared and expressed and subject to the following conditions, covenants and agreements, that is to say:

201 First. These presents are upon the express condition that if the said party of the first part, its successor or successors, or

assigns, shall well and truly pay or cause to be paid unto the holders of the said bonds issued or to be issued as aforesaid, the principal and interest to grow due to them, the said holders, respectively, at the times and *and* in the manner mentioned in said bonds, and in the interest coupons thereto annexed, according to the true intent and meaning thereof, then these presents and the estate, title and interest hereby granted and conveyed shall cease, determine and be wholly void.

Second. Until default shall be made by the said party of the first part, in the payment of the principal and interest of said bonds, or any of them, according to the tenor and effect thereof, the said party of the first part, its successor or successors, or assigns, shall possess, manage, control, operate, use and enjoy the property, franchises, premises, railroads and realty and their appurtenances hereby mortgaged and receive, take and use all the rents, income, profits and toll thereof, as if this indenture had not been made, and on payment in full of all the bonds issued hereunder and the interest thereon, the estate, title and interest hereby vested in the said party of the second part, its successor or successors and assigns shall cease, and all the premises, property, railroads and estate hereby conveyed shall be surrendered and delivered up to the said party of the first part, its successor or successors, or assigns, who shall hold and possess the same as if this instrument had not been executed.

Third. In case default shall be made in the payment of any interest to accrue on any of said bonds, and such interest shall remain unpaid for six months after due demand, the whole principal of said bonds, together with all interest accrued and running unpaid thereon shall at the option of said trustee become due and be payable, but a majority in interest of the holders of all the bonds then outstanding shall have the right and power, by an *interest* in writing
202 under their hands, to instruct and require the said trustee to exercise such option and proceed as if such principal was due, and said trustee shall be bound by such instruction and requisition and take action accordingly.

Fourth. In case default shall be made in the payment of any interest to accrue on any of said bonds when the same may become due and payable, and such interest shall remain in arrear for six months after it shall have been duly demanded, or in case default shall be made in the payment of the principal of the said bonds hereby secured, or of any or either of them, when the same shall become due and payable according to the tenor and effect of said bonds, and whether by lapse of time or default in the payment of interest, then and in either of such cases it shall be lawful for the said trustee, and upon the written request of a majority in interest of the holders of said bonds then outstanding and an adequate indemnity being given to it against all costs, expenses and liabilities to be incurred in executing this article, it shall be the duty of said trustee to enter into and upon and take possession of the railroads and real and personal property and franchises hereby conveyed and mortgaged, and each and every part thereof, and to hold, use, manage, maintain and operate the said railroads and the

business thereof, be its own managers, superintendents, agents and employees, to as full an extent as the said party of the first — may or might lawfully do, until the amount due for said principal, or said interest, on said bonds or any of them, as the case may be, shall be paid, or until a sale of said mortgaged property shall be made as hereinafter provided; and during such period, from time to time, to make at the cost and expense of the trust estate, such repairs and replacements and alterations, additions and improvements, thereto, as well in respect to rolling stock and equipment as to the said railroad and appurtenances as may seem to said trustee to be necessary, proper and judicious; and to collect, receive and take all the incomes, rents, revenues, tolls,
203 profits and issues thereof and therefrom, and of and from every part thereof, and after deducting the cost and expense of operating said railroads and conducting the business thereof, and of all repairs, replacement-, alterations, additions and improvements as aforesaid, and of all taxes, assessments and other charges upon the said property and premises, and every part thereof, and just and reasonable compensation for its own services and for the services of all agents, clerks and employees properly engaged and employed, including reasonable attorney and counsel fees, then to apply the moneys arising as aforesaid to the payment of the interest due on said bonds, and in case the principal of said bonds be then due to apply said moneys, without preference, priority or distinction of one bond over another, to the payment, first, of the interest due and unpaid on the bonds then outstanding and secured hereby, and, second, to the payment of the principal of said bonds in full, if said proceeds be sufficient thereto, but if not, then *pro rata*. And in case the said moneys arising and received as aforesaid, shall be sufficient to the payment of the said specified costs, charges, expenses, taxes, interest and principal of said bonds which may be due as aforesaid, the said trustee shall forthwith surrender up, deliver and fully restore the possession, use and enjoyment of said railroads, premises and property, together with any and all surplus of said moneys and proceeds, if such there be, to the said party of the first part, its successor, successors or assigns.

Fifth. And in case default shall be made in the payment of any principal or interest hereby secured to be paid at the time the same may become due and payable, and such default shall continue for the period of six months after due demand of payment, or if the party of the first part shall suffer or allow any taxes or charges to fall in arrears whereby the security of this mortgage may become impaired, then it shall be lawful for the said trustee, and upon the request of a majority in interest of all the holders of said
204 bonds then outstanding and an adequate indemnity to said trustee against all costs, expenses and liabilities to be incurred in executing this article, it shall be the duty of said trustee, with or without entry, to sell the said railroads, premises and property and corporate rights and franchises hereby conveyed or so much thereof as may be requisite to provide for the payment of the amount due on said bonds according to the terms thereof to the highest bidder

at public auction, in the town of Salisbury in the State of North Carolina on giving at least ninety days' public notice of the time and place and terms of such sale and of the specific property to be sold, by advertisement in at least three newspapers published in the State of North Carolina, one of which newspapers shall be published at Salisbury, and one at Raleigh, in said State, and after such notice said trustee may make such sale in accordance therewith, or may adjourn the same to a subsequent date whereon such sale shall be made upon like notice published in like manner, and upon the consummation of such sale the said trustee may execute and deliver to the purchaser or purchasers of said property, or any part thereof which may be sold good and sufficient conveyances, transfers or assignments in law for the same, and deliver possession thereof and thereupon the said sale, so made as aforesaid, shall be a perpetual bar, both in law and in equity, against the said party of the first part, its successor, successors or assigns and against all persons whomsoever lawfully claiming the said property through or under it or them, and upon the completion of said sale, as aforesaid, the principal of all bonds issued hereon or hereunder, and at such time outstanding shall forthwith become due and payable, anything in said bonds to the contrary notwithstanding. And after deducting from the proceeds of such sale all costs and expenses thereof, including attorney and counsel fees, and all expenses, advances and liabilities which may have been made or incurred by it in or about the performance of its duties under these presents or in relation to said property, including the maintenance and operation of said
205 railroads and managing the business thereof while in possession thereof, and taxes, assessments and other proper charges upon said property, or any part thereof, and a reasonable compensation for its own services, said trustee shall apply the proceeds of such sale to the payment, in full or *pro rata* as such net proceeds may suffice, in the first instance, of all or any overdue and unpaid coupons, and thereafter to the payment of the principal and interest due and unpaid on said bonds then outstanding, without discrimination as between principal and interest, in full, if such net proceeds shall be sufficient thereto, but if not then ratably and without preference, and if after payment of said bonds and interest in full, a surplus shall remain of such proceeds, said trustee shall pay over the same to the party of the first part, its successor, successors or assigns. And it is hereby declared the receipt of the said trustees shall be a full and sufficient discharge to the purchaser or purchasers of the property sold at said sale as aforesaid, for his or their purchase-money, and he or they after payment thereof and holding such receipt shall not be liable for the proper application of said purchase-money or in any manner answerable for its loss or misapplication in whole or in part.

Sixth. In case of the sale of the said premises or property or any part thereof, whether by said trustee as aforesaid, or under judicial process, the holders of the bonds secured hereby, or any of them, or the said trustee on behalf of said bondholders, shall have the right to purchase upon equal terms with other persons and any purchaser

or purchasers at said sale, after making a cash payment sufficient to cover the costs and expenses of the sale, and all other charges required to be paid or provided for in actual cash, to be determined by the said trustee, shall have the right to deliver and pay to said trustee as cash towards the payment of the residue of the purchase-money any of said bonds or coupons to or towards the payment whereof the net proceeds of such sale shall be legally applicable, the amount of such bonds or coupons, so to be paid in, to be determined and fixed by said trustee and at a sum which shall, upon a
206 proper distributing and accounting for such proceeds, be at least equal to the share or proportion payable out of such net proceeds to the holders of such bonds or coupons.

Seventh. The said trustee shall at all times have full power and authority, to be exercised in its own discretion, and not otherwise, to release and convey to any party or parties who may be designated in writing by the said party of the first part, to receive the same, or to release from the lien or operation of these presents in such other manner as the said trustee may deem proper, or any portion of the premises or property, lands, tenements or hereditaments hereinbefore granted and conveyed, or any part thereof, which may be or become necessary for the use in connection with said railroads by reason of change in the location of any track or tracks or the appurtenances thereto, or of any depot, station-house, shop or other buildings connected with said railroads, or which the said party of the first part may deem expedient to disuse or abandon by reason of such change or for any other good reason, and the said trustee may consent to any change in the location of said track or tracks and the appurtenances thereto, or of any depot, station-house, shops or other buildings, which in the judgment of the said party of the first part, shall become expedient, and make and deliver all instruments requisite to carry the same into effect; and also to convey and release, as aforesaid, on like request any other real estate and chattels real of the said party of the first part hereby conveyed and mortgaged, which the said party of the first part may desire to sell, lease or otherwise dispose of; provided and it is hereby expressly agreed, that all sums of money or other consideration paid, or agreed to be paid for such real estate or chattels real shall be received and retained by the said trustee in place of such real estate or chattels real, subject to the terms and conditions of this mortgage and for the use and purposes of the trust hereby created, and the rental and other income from such real estate, or the interest
207 of the funds received in payment upon any sale thereof shall be applied to the payment of the interest on said bonds and the principal sum of such proceeds shall be applied to the payment of the said bonds at their maturity, or whenever they may become due and payable by the terms of this mortgage, but any lands which may be acquired for permanent use in substitution for any so released, shall be conveyed to said trustee upon the trusts of these presents and the proceeds of any and all lands and premises for which others shall not within a reasonable time be acquired and so conveyed and substituted as aforesaid shall be paid over to the

said trustee to be by it applied as hereinbefore provided and the said trustee shall also have full power to permit the said party of the first part at its discretion from time to time to dispose of such portion of the machinery, rolling stock, tools, implements, material and other personal property which shall be at any time acquired or held for the use of said railroad, or shall have become unfit or unnecessary for such use, but any and all new machinery, rolling stock, tools, implements, material or other personal property which may be acquired in substitution for any so released shall become and be, immediately upon the acquisition thereof subject to the lien and operation of these presents without any new or other conveyance or transfer, or other act or proceedings of all sales of machinery, rolling stock, tools, implements or other personal property, as aforesaid, which may not be invested in new or other machinery, rolling stock, tools, implements or other personal property, for the use of said railroads, shall be paid over to said trustee to be applied as hereinbefore, in this article, provided.

Eighth. The trustee herein shall not be under any obligation to take any action towards the execution of this trust which, in its judgment, will involve it in personal expense or liability, unless one or more of said bondholders shall, as often as required by said trustee, give it reasonable indemnity against the same, anything herein to the contrary notwithstanding, and the said trustee may re-
208 sign and discharge itself of the trust hereby created, by notice in writing to the party of the first part, giving at least three months before such registration shall take effect, or such shorter time as the said party of the first part shall accept as adequate. In case a vacan-y shall at any time occur in the office of the trustee hereunder, by resignation or other cause, the board of directors of the said party of the first part, its successor or successors or assigns shall have the right to fill such vacancy by the appointment attested by the certificate in writing of the president and secretary of the party of the first part, its successor, successors or assigns, under its or their corporate seal, duly acknowledged and filed in the office of the secretary of state of the State of North Carolina. Notice of such appointment shall be given by publication in at least one newspaper published in the city of New York and one in Salisbury, North Carolina, at least once a week for eight successive weeks immediately after the filing of said certificate, and the successor so appointed shall be and continue to be the trustee hereunder until holders of three-fourths in value of the bonds hereby secured and then outstanding shall, by an instrument or concurrent instrument in writing executed under their hands and seals, or the hand and seal of their duly authorized attorney-in-fact for that purpose and filed in the office of the secretary of State of North Carolina, appoint a new trustee hereunder, and the successor so appointed shall, without any further act, deed or conveyance, become and be the trustee hereunder, and any trustee so appointed to fill any such vacancy or to succeed any trustee hereunder, shall be vested with and entitled to all the rights, title, interest, estate, powers, duty and trust herein and hereby granted, conveyed, created expressed and declared, as if

herein originally named as trustee. Upon the resignation or removal of any trustee, all power and authority acquired and held by virtue of these presents shall cease and be wholly at an end, but such retiring trustee shall, if the same be demanded, duly
209 execute and deliver a deed of conveyance sufficient to wholly vest in the trustee succeeding, and upon the trusts herein expressed and declared, all the property real and personal, rights and franchises which may be at any time held upon said trusts.

In witness whereof the said Western North Carolina Railroad Company has caused its corporate seal to be hereto affixed and these presents to be signed by its president and attested by its secretary in pursuance of a resolution of its board of directors, and also to be signed by two members of its corporation and attested by two witnesses on the day and year first above written. And at the same time and for the purpose of evidencing its acceptance of the trusts herein and hereby created, the said Central Trust Company of New York has likewise caused its corporate seal to be hereto affixed and these presents to be signed by its president and attested by its secretary in pursuance of a resolution of its board of directors.

THE WESTERN NORTH CAROLINA RAILROAD COMPANY,
By A. B. ANDREWS, *Pres.*
GEO. P. ERWIN, *Sec.* [SEAL.]
S. H. WILEY,
W. E. ANDERSON,
Members of the Corporation.

Signed and sealed in the presence of
D. SCHENCK.
JAS. W. WILSON.

CENTRAL TRUST COMPANY OF NEW YORK,
By G. SHERMAN, *Vice-President.* [SEAL.]

Signed and sealed in the presence of
G. S. ELLIS.
H. E. MARLIN.

Attest: B. GANTSHELL, *Apt. Sec'y.*

210 STATE OF NORTH CAROLINA, *Rowan County,* } *ss:*

I, J. M. Horah, clerk of the superior court in and for the county and State aforesaid, do hereby certify that on this 22nd day of September, in the year of our Lord one thousand eight hundred and eighty-four, before me personally appeared Alexander B. Andrews and G. P. Erwin and S. H. Wiley and W. E. Anderson, to me known, who being duly sworn, each for himself, did depose and say, that the said Alexander B. Andrews is president, and the said Geo. P.

Erwin is secretary, of the Western North Carolina Railroad Company, the corporation described in and which executed the foregoing mortgage deed of trust; that the seal affixed thereto is the corporate seal of said company and was thereto affixed by order of the board of directors, and that by like order and authority they, respectively, signed their names thereto and caused the same to be signed by two members of the corporation and to be attested by subscribing witnesses, and now, respectively, acknowledge the same and the due execution thereof to be the act and deed of the said Western North Carolina Railroad Company for the use and purposes therein mentioned.

In testimony whereof I have hereto subscribed my name and affixed my official seal on the day and year last above written.

J. M. HORAH, [SEAL.]
Clerk Superior Court, Rowan County.

STATE OF NORTH CAROLINA, *County of Rowan,* } ss:

I, John M. Horah, clerk superior court in and for the county and State aforesaid do adjudge that the foregoing mortgage deed of trust has been duly acknowledged. Therefore, let the same with the annexed certificate be registered.

J. M. HORAH, [SEAL.]
Clerk Superior Court, Rowan County.

211 STATE OF NEW YORK, *City and County of New York,* } ss:

I, Charles Edgar Mills, a commissioner for the State of North Carolina duly commissioned and qualified residing in said city and county of New York, do hereby certify that George Sherman the vice-president of the Central Trust Company of New York, personally appeared before me on this 27th day of September, A. D. 1884, who being duly sworn did depose and say that he resides at New York city, in the State of New York, that he is the vice-president of the Central Trust Company of New York, the corporation described in and *who* executed the foregoing instrument, that the seal affixed to said instrument is the corporate seal of said corporation affixed thereto by due authority. And at the same time, the said George Sherman, as such vice-president acknowledged to me the due execution of the foregoing instrument as his act and deed and the act and deed of said corporation, the Central Trust Company of New York, and caused said instrument to be attested by subscribing witnesses.

In witness whereof I have hereunto set my hand and affixed my official seal this 27th day of September, A. D. 1884.

CHARLES EDGAR MILLS, [SEAL.]
Commissioner for North Carolina in New York,
115 and 117 Broadway, New York City.

STATE OF NORTH CAROLINA, }
Rowan County. }

Superior Court, October 1st, 1884.

The foregoing certificate of Charles Edgar Mills, commissioner, is adjudged to be correct. Let this instrument with the certificate be registered.

Witness my hand and official seal.

J. M. HORAH, [SEAL.]
Clerk Superior Court, Rowan County.

212 STATE OF NORTH CAROLINA, }
Rowan County. }

OFFICE OF REGISTER OF DEEDS OF SAID COUNTY.

I, Horatio N. Woodson, register of deeds in and for the county of Rowan, State of North Carolina, do hereby certify that the foregoing mortgage was filed in this office for registration on the first day of October, A. D. 1884, at 4 o'clock p. m., and registered.

HORATIO N. WOODSON,
Register of Deeds.

STATE OF NORTH CAROLINA, }
Rowan County, } *ss:*

I, J. M. Horah, clerk of the superior court in and for the county of Rowan, State of North Carolina, do hereby certify that Horatio N. Woodson is the register of deeds in and for said county and State, and that his signature to the certificate last above is in his own proper handwriting.

In testimony whereof I have hereto set my hand and affixed my official seal, this 1st day of October, 1884.

J. M. HORAH, [SEAL.]
Clerk Superior Court, Rowan County.

213 *Supplementary Petition and Bill of Complaint.*

And on March 12th, 1898, as of March 11th, 1898, the plaintiff, The Central Trust Company of New York, files in our said court a supplementary petition and bill of complaint in the words and figures as follows, to wit:

In the Circuit Court of the United States, Western District of North Carolina, Statesville, North Carolina, March 9th, 1898.

IN MATTER OF THE SUIT OF CENTRAL TRUST COMPANY OF New York, Complainant,
against
WESTERN NORTH CAROLINA RAILROAD COMPANY and Another Respondents, Depending in the Circuit Court of the United States for the Western District of North Carolina.

Now comes the complainant, the said Central Trust Company of New York, your orator, and alleges:

I. That, as appears from the record in this suit, the complainant exhibited its original bill of complaint in this honorable court against the respondent- on or about the 20th day of April, 1894, and a decree was entered by this court in due time, granting the relief prayed for, to wit: foreclosure and sale of the Western North Carolina railroad and its franchise.

II. That the said railroad and franchise were sold by a master duly appointed by this court on or about the 20th of August, 1894, when the Southern Railway Company, a corporation created and existing under the laws of Virginia, became the purchaser. That the sale of the said railroad property and franchise, as made by the master, was duly confirmed by this court, and a decree of confirmation of said sale passed with a further decree directing the said master to make, execute and deliver to the said purchaser, the Southern Railway Company, a deed, which deed was so made, executed and delivered, conveying the said Western North Carolina railroad and its franchise to the said Southern Railway Company. That the said deed was so delivered on the 22nd day of August, 1894, and after being duly admitted to probate, was registered according to law on the 5th day of November, 1894. That by virtue of this said decree, sale, confirmation, and deed of conveyance, all made in the due course of the court and according to law, the said Southern Railway Company, as set out in the deed, became
214 the sole owner of the said Western North Carolina railroad and of all the property incident thereto, together with the franchise of the corporation, subject to the lien of the first mortgage, as set out in this proceeding.

III. That the Southern Railway Company, by reason of its purchase of this property at the judicial sale of the same made by the officer of this court and in pursuance of its decree, having complied with every condition and requirement attending the said sale, became a party to this suit, and, as your orator is advised, is entitled to the protection of this court in the use and enjoyment of the said property which it has been in possession of and duly operating as said sole owner since the 24th day of August, 1894, against the pretended claims and rights of all persons whatsoever.

IV. That, having treated with this honorable court in the said purchase, The Southern Railway Company comes, and together with

your orator, The Central Trust Company of New York, complains and says:

I. That it is a corporation created and existing under the laws of the State of Virginia, and doing business in the State of North Carolina and within the jurisdiction of this court, and brings this petition and bill of complaint as supplemental to the original bill in the above-entitled cause and in aid of the relief granted in the same against S. T. Pearson, Mrs. Clemye James, administratrix of W. A. James, deceased, and Mrs. Fannie E. Howard, administratrix of John H. A. Howard, all of the State of North Carolina and citizens and residents of the western district of North Carolina and within the jurisdiction of this court; and thereupon the said Southern Railway Company, together with your orator, The Central Trust Company of New York, further complains and says:

II. That the matter in dispute exceeds, exclusive of interest and costs, the sum and value of two thousand dollars, this petition and supplemental bill being brought for the purpose of securing to your orator, The Southern Railway Company, the possession and enjoyment of its property, the Western North Carolina railroad, the same together with its franchise, having been purchased at and under a judicial sale by virtue of a decree of this court made and entered in this suit, and that the said railroad property is situate in this, the western district of North Carolina, and within the jurisdiction of this court.

215 III. That in the year 1896, on or about the 17th of November—more than two years after the Southern Railway Company purchased and took possession of the Western North Carolina railroad, under and by virtue of the decree made and entered as aforesaid, and the deed of conveyance duly executed to the said Southern Railway Company, a copy of which being hereto attached and made a part of this bill, in accordance with the terms of the said decreee—W. A. James, now deceased, and John H. A. Howard, now deceased, were in the employment of The Southern Railway Company, your orator, the former as an engine-driver and the latter as a fireman. That being so employed at and on the said day, they, as such engineer and fireman, were driving an engine over a mountain at a place on the line of the said railroad so purchased, and being operated by your orator, and while so engaged, by reason of a collision between the engine upon which they were and another, met their death. That in due time, early in the year 1897, the personal representatives of the said deceased, James and Howard, issued summonses against "The Western North Carolina Railroad Company," as sole defendant, in two separate actions, and although, under and by virtue of section 697 of the Code of North Carolina, the corporation known as the Western North Carolina Railroad Company became, immediately and "*ipso facto*," upon the execution of the deed, the conveyance by the master to the Southern Railway Company, "dissolved," prosecuted the said actions to final judgments in the superior court of Rowan county, in this district and within the jurisdiction of this court. That the said judgments are as follows, to wit: One in favor of Mrs. Clemye James,

administratrix, against "The Western North Carolina Railroad Company," in the sum of fifteen thousand dollars, and the other in favor of Mrs. Fannie E. Howard, administratrix, against "The Western North Carolina Railroad Company," in the sum of five thousand dollars. That both of these judgments were rendered at the February and March term of the said superior court of Rowan for the year 1898, and are so entered upon the judgment docket of the said court.

IV. That the deed of conveyance was executed and delivered to The Southern Railway Company, your orator, under and by virtue of the decree of this court, as set out in the copy hereto attached and before referred to, on the 22nd day of August, A. D. 1894, and the same was duly probated and registered, as provided by law, on the 5th day of November, 1894, more than two years before the deaths of the said James and Howard, as hereinbefore set forth. That in accordance with the terms of the decree of this court and
216 sale and conveyance, as above set out, and having complied with all conditions and requirements imposed and made, your orator immediately, to wit: on the 22nd day of August, 1894, took possession of the said railroad property, and has continued to operate it in the sole ownership of every part of the same. That by this foreclosure proceeding, as is shown to this court by the pleadings in the cause by the said sale and conveyance, your orator, The Southern Railway Company, has acquired the ownership of the said Western North Carolina railroad and the property incident to it and the franchise of maintaining and operating it as such, the corporate existence, as your orator is advised and believes, not being essential to its use and enjoyment, but altogether distinct and separate from the franchise of the corporation.

V. That the said S. T. Pearson and Mrs. Clemye James, administratrix as aforesaid, have commenced an action in the superior court of Rowan county, within the western district of North Carolina, entitled as follows: "S. T. Pearson and Clemye James, administratrix of W. A. James *vs.* Western North Carolina Railroad," the purpose of the same being to have a receiver appointed for the Western North Carolina railroad, a copy of the complaint, filed in the action being hereto attached, and marked Exhibit A.

VI. That the said Mrs. Fannie E. Howard, administratrix, is not a party plaintiff in the said action, but occupies the same position, and is ready to assert her pretended right to have a receiver appointed in the same manner and for the same purpose that the said Mrs. Clemye James is attempting to do.

VII. That the said S. T. Pearson, one of the plaintiffs in the said action, claims to own one share of stock in the said Western North Carolina Railroad Company, which said stock is of no value, and is being used in said action to advance the pretended claims of the plaintiffs to the receivership demanded in the complaint. That there have been several reorganizations of the said Western North Carolina Railroad corporation since the said one share of original stock was issued to the assignor of S. T. Pearson in 1856, and in 1880 the said The Western North Carolina railroad was sold by the

legislature, and the old corporation dissolved, and a new cor-
217 poration formed. That as your orator is advised and believes, the said one share of stock has no existence, is of no value, and is no claim against the said dissolved corporation.

VIII. That The Southern Railway Company, your orator, is a solvent corporation, and amply able to pay any damages which the said James and Howard may recover in their actions brought against your orator, The Southern Railway Company, the said actions having been commenced in the superior court of Rowan county, in 1897, for the same alleged causes as were set out in the actions prosecuted against the dissolved corporations as hereinbefore set forth.

IX. That as appears from the complaint in the said action, the relief demanded by the plaintiffs is as follows:

I. That a "permanent receiver be appointed to take charge of the franchise and property of the Western North Carolina Railroad Company, and to operate the same under the orders of this court.

"II. That a referee be appointed to report to the court the nature and the character of the indebtedness of the said Western North Carolina Railroad Company, and that all creditors who will make themselves parties in this action may be authorized to prove their claims before such referee, and that all stockholders may prove before him the number and nature of their respective shares of stock, and that the said referee be directed to report to the court what claims, if any, constitute liens upon the franchise and property of the said company, and the order of priority of liens, if any exist.

"III. For such other and further relief as to the court may seem just.

"IV. For costs of action."

X. That, upon the commencement of the said action, and the filing of the complaint, the said plaintiffs obtained the following order from the judge of the superior court, to wit:

"On motion of counsel for the plaintiffs in the above-entitled action, and on hearing the complaint read, as an affidavit, it is ordered by the court, that notice issue to the defendant to show cause before the undersigned judge riding the 8th judicial district, at chambers, at Lexington, on the 16th day of March, 1898, why a receiver should not be appointed to take charge of the property and effects of The Western North Carolina Railroad Company, the defendant
218 above mentioned. It is further ordered, that the service of a certified copy of this order, and of the complaint of the plaintiffs, shall be deemed notice to show cause.

JAMES D. McIVER,
Judge Riding the 8th Judicial District."

XI. (Struck out by the court as being immaterial.)

XII. That the said S. T. Pearson and Mrs. Clemye James, plaintiffs in the said action, commenced in the superior court of Rowan county, and the said Fannie E. Howard, administratrix as aforesaid, as your orators are informed and believe, are insolvent, and wholly

unable to pay any damages which may be adjudged against them in any action, prosecuted, on account of their wrongful conduct, as herein set forth.

XIII. That, as appears by the complaint filed by the plaintiffs, Pearson and James, in the proceeding in which the said order to show cause was granted, the purpose of the said parties, plaintiffs, is to have declared null and void the deed of conveyance from the said master to your orator made, executed and delivered in accordance with the decree of this honorable court, and, further, to have a receiver take immediate possession of the Western North Carolina railroad and all property incident thereto, thereby depriving your orator, The Southern Railway Company, of its possession of the same; and, on account of matters and things alleged against the said Western North Carolina Railroad Company to have taken place and transpired long after the said sale and conveyance to your orator, and more than two years after the said Western North Carolina Railroad Company had ceased to exist, and became dissolved under and by virtue of the laws of North Carolina, as hereinbefore set forth.

XIV. That the alleged right of the plaintiffs to have this relief is based upon a decision of the courts of North Carolina to the effect that, by the said sale and conveyance, as set out in this petition and bill, the said corporation, to wit: the Western North Carolina Railroad Company, was not dissolved, but continues to exist, and is answerable to the plaintiffs in the actions for damages growing out of the deaths of the said intestates of James and Howard, and personal representatives, as before set out in this bill.

XV. That the said decision is a construction of section 697 of the Code of North Carolina, and sets aside the statute
219 which provides that, upon the execution of the conveyance to the purchaser, as in this case, to your orator, The Southern Railway Company, the corporation as in this case, the Western North Carolina Railroad Company, shall become "*ipso facto*" dissolved.

XVI. That this decision construing the said act—the said statute of the said State—is not binding upon this court, as your orator is advised and believes, for the reason that it was rendered more than two years after the rights of The Southern Railway Company, your orator, had accrued and been adjudged by this honorable court, and after the said Southern Railway Company had become the owner of the said Western North Carolina railroad and its franchise, and was in the sole possession and quiet enjoyment of the same, under and by virtue of the decree of this court as hereinbefore alleged.

XVII. That, in the light of the matters and things herein set forth, and by reason of the same your orators, the said Central Trust Company of New York, complainant in the original bill in this suit, and the Southern Railway Company, a party to this petition and supplement to the original bill by permission of the court, have reason to fear, and do believe and fear, the plaintiffs, the said Pearson and James, in the action begun in the superior court of Rowan county, as hereinbefore alleged, will secure and obtain from the

court a receiver as prayed for in their complaint, unless restrained and enjoined from proceeding any further in the prosecution of their action by this honorable court; and that the receiver so appointed will proceed immediately to take possession of the property, the said Western North Carolina railroad, and thereby deprive your orator of its use and occupation of the same, and also doing to your orators great and irreparable damages and injury. That the securities and bonds issued by your orators upon the said property, the Western North Carolina railroad, constituting as it does a very valuable part of the lines and system of the Southern Railway Company, the said securities and bonds being in the hands of innocent and *bona fide* holders will be greatly impaired in value should the said plaintiffs proceed to further prosecute their said action and obtain the appointment of the receiver as before set out in this petition and bill.

XVIII. That the attempt upon the part of the said plaintiffs, Pearson and James, to thus take from your orator, The Southern Railway Company, its property as above set out, is in disregard of the decrees and orders of this court, and as your orators are advised and believe, in contempt of the same.

Wherefore, the premises considered, your orators pray:

I. That this honorable court enter a decree, that a writ of injunction, conformable to the prayer of this petition and bill, be issued to the plaintiffs in the action set out in the bill depending in the superior court of Rowan county, wherein S. T. Pearson and Mrs. Clemye James, administratrix, are plaintiffs, and The Western North Carolina — Company is defendant, enjoining them, or any of them, from proceeding any further in the prosecution of the said action, either by themselves or by their agents or attorneys, until the further order of this court.

II. That not only a writ of injunction, conformable to the prayer of this bill, be issued, but also a writ of subpœna and notice directed to the said S. T. Pearson and Mrs. Clemye James, commanding them on a certain day to appear and answer unto this bill of complaint, and to abide and perform such order and decree in the premises as to the court shall deem proper and required by the principles of equity and good conscience.

III. That, the premises considered, a writ of conjunction also be issued to Mrs. Fannie E. Howard, administratrix, enjoining her from instituting any action or proceeding such as the plaintiffs Pearson and James have begun, and that a subpœna and notice as above set forth be issued to her to appear and answer unto this bill at a time and place as above set out.

IV. That if in anything your orators and petitioners are mistaken in their relief, then they pray for all such other further and general relief as the premises may warrant and the rules of equity allow.

CENTRAL TRUST COMPANY OF NEW YORK AND
SOUTHERN RAILWAY COMPANY,
By CHAS. PRICE, *Solicitor*.

UNITED STATES OF AMERICA,
Western District of North Carolina.

SALISBURY, N. C., *March 10th*, 1898.

This day came Charles Price, who makes oath that he is the agent and attorney of the petitioners and complainants, and that the matters alleged in this petition and bill are true, except as to those stated on information and belief, and as to those matters he believes them to be true.

CHAS. PRICE.

221 Sworn to and subscribed before me this 10th day of March, 1898.

[SEAL.]

W. G. WATSON,
Clerk Superior Court, a Court of Record,
Rowan County, North Carolina.

EXHIBIT A.

NORTH CAROLINA,
Rowan County,

In the Superior Court, May Term, 1898.

S. T. PEARSON and CLEMYE JAMES, Administratrix of W. A. James,
vs.
WESTERN NORTH CAROLINA RAILROAD COMPANY.

The plaintiffs, on behalf of themselves and all other stockholders and creditors of the company above named as defendant, complain and allege:

1st. That the Western North Carolina Railroad Company is a corporation created by an act of the General Assembly of the State of North Carolina, passed at its session 1854–'5, and published by the authority of said State as chapter 228 of the Laws of 1854–'5, at page 257, and that the said defendant company was duly organized under the authority of said act about the — day of ——, in the year 1856, and that plaintiffs have instituted an action by the issuing of a summons against said company.

2nd. That the said original charter was subsequently amended by an act of the General Assembly of North Carolina, at its session of 1866–'7, and published by the authority of said State as chapter 94, Laws of 1866–'7, at page 52, but that both prior to and subsequent to the passage of said last-named act private individuals and municipal corporations had subscribed, from time to time, under the terms of the said charter of said company to the capital stock of said company, so as to comply with the condition that the State of North Carolina should only subscribe to the said capital stock after solvent individual stockholders had subscribed a definite number of shares when the said State, through its constituted authorities, was empowered to subscribe twice the *numer* of shares so subscribed by individual stockholders and municipal corporations.

3rd. That prior to the 4th day of March, in the year 1880, by means of subscriptions made in the said proportion of two
222 shares on the part of the State and one on the part of the individual shareholders, a sufficient sum of money had been raised to complete the line of the said railway and equip and operate it from Salisbury, in Rowan county, to the Tennessee line at Paint Rock, and to grade a portion of the branch line projected from a point near Asheville, North Carolina, to Murphy, in Cherokee county, and that on said 4th day of March, 1880, there had been subscribed to the capital stock of the said company, as affiant is informed and believes, about the sum of $6,000,000 in shares or $100 each, of which shares the said State was the owner of two-thirds and individuals of one-third.

4th. That in section 8 of the said act passed on the 4th day of March, 1880, the legislature of the State of North Carolina attempted to authorize a reorganization of the defendant company upon a plan whereby the entire capital stock of said company should amount to only $4,000,000.00 of preferred stock, of which the aggregate amount of stock to be held in the reorganized company by the individuals and municipal corporations, who had theretofore subscribed and paid up shares amounting to $2,000,000.00 of its capital stock, should be only the sum of $212,500, to be divided *pro rata* amongst said individuals and municipalities in proportion to the amount theretofore actually subscribed and paid in by each. And it was further provided in said section that the company, when reorganized under said act, should be empowered by a vote of a majority of the stockholders in interest to issue second or common stock to an amount not exceeding $15,000 per mile of said road, and that said company as reorganized should be governed by a board of 9 directors, to be elected by a majority vote of the stockholders in interest, which 9 directors were to be the governing board, instead of 12 directors, 8 appointed by the governor of the State and 4 elected by private stockholders, in accordance with the provision of the charter as amended prior to said 4th day of March, 1880.

5th. That the plaintiff, S. T. Pearson, is the owner of one share of the original capital stock of said company, subscribed and paid in about the — day of ——, 1856, and which he has acquired by assignment from the original holder of said share. And that, as plaintiffs are advised, informed and believe, not only the share of the stock of said company which has been assigned to the plaintiff, Pearson, as aforesaid, but a large number of other shares amounting in the aggregate to $3,000,000.00, or 300 shares of the capital stock or more, were not represented in any meeting of the shareholders of the said defendant com-
223 pany at which any other stockholders assented or purported to agree to adopt the said act passed on the 4th day of March, 1880, as an amendment to the charter of the defendant company, or to reorganize the said company under the provisions of said act. The plaintiffs are advised, informed and believe that neither the plaintiff, Pearson, nor any other holders of shares of the capital stock, subscribed and paid up before the said 4th day of March, 1880,

and which was not represented in any meeting of stockholders which attempted to accept the said act of the 4th of March, 1880, as an amendment to the charter, are bound by its provisions.

6th. That, as plaintiffs are advised, informed and believe, a portion of the private stockholders of the said company met soon after the passage of the said act of March 4th, 1880, and attempted to ratify the same, and bind the holders of from 300 to 500 shares not represented and not consenting to said action, but that the said attempt to bind the plaintiff, Pearson, and other stockholders not so represented, and who are invited to become parties plaintiff to this action, was ineffectual in law to subject them to the terms of the said act or subsequently to subject shares of the capital stock of the company held by them to the lien of any mortgage or incumbrance which the company, purporting to have been reorganized under said act, attempted to create by authorizing the execution of bonds purporting to be secured by mortgaging the franchise and property of said company.

7th. That, as plaintiffs are advised, informed and believe, a portion of the private stockholders of the said Western North Carolina Railroad Company met on the — day of ——, 1880, and attempted to reorganize the said Western North Carolina Railroad Company in pursuance of the provisions of the said act of March 4th, 1880, but, without the presence of the assignor of the said Pearson or other private stockholders holding in the aggregate from 300 to 500 shares of the capital stock of said company, and thereafter proceeded to take possession of the road-bed and property of the said company, and to operate its road and to supervise and direct the work of construction on the uncompleted portions of its line.

8th. That thereafter, to wit, on the first day of September, 1884, the said company, purporting to have been reorganized, as aforesaid, caused to be executed by its officers bonds to the amount of $12,500 per mile of its completed road, running 30 years, and bearing
224 6% per annum interest, less $850,000 in said bonds, reserved under an agreement with the State of North Carolina, and attempted to secure the payment of the interest on said bonds by executing a mortgage deed conveying the property and franchise of said company to the Central Trust Company of New York.

9th. That on the 2nd day of September, 1884, the said company, so purporting to have been reorganized, attempted to authorize the issue of bonds of said company to the amount of $15,000 per mile of its completed road, running 30 years, and bearing 6% per annum interest, and to secure the same by executing a second-mortgage deed conveying the property and franchises of said company to the Central Trust Company of New York, but with the express proviso that it should constitute a second lien.

10th. That on the 30th day of April, 1886, the said company, purporting to be so reorganized, executed a paper-writing purporting to be a lease of its franchise and property to a corporation created under the laws of the State of Virginia, under the corporate name of the Richmond & Danville Railroad Company, for a term of 99 years, and the said Richmond & Danville Railroad Company, im-

mediately after the execution of said lease, took possession of its road-bed and property, and operated the same as a carrier of freight and passengers until about the — day of ——, 1892, when the said franchise and property of the said company were, by an order of the circuit court of the United States for the western district of North Carolina, placed in the hands of receivers.

11th. That, subsequently, about the — day of ——, 1894, the Western North Carolina Railroad Company, so reorganized, abdicated its duty to the State of North Carolina as a corporation *de facto* existing under its laws by permitting another corporation, without authority of law, to take possession of its road-bed, property and franchise, and attempt to discharge the duties to the State of North Carolina which it is obligatory upon the Western North Carolina Railroad Company to discharge, in accordance with the terms of its charter. And that the said company created and organized under the laws of the State of Virginia under the corporate name of the Southern Railway Company still has possession of the rolling stock and all other property of the said Western North Carolina Railroad Company, and is still operating the said road, claiming to be the owner of its franchises and property, although the supreme
225 court of North Carolina has adjudged and declared the deed, under which it claims the said franchise and property, null and void.

12th. That the said company operating the said road as a carrier of freight and passengers claimed under a deed purporting to have been made in pursuance of a decree of foreclosure of said second-mortgage bonds, but subject to the said first-mortgage bonds, which are still outstanding, and which now amount in the aggregate to about $1,500,000.

13th. That, as the plaintiffs are advised, informed and believe, the said Southern Railway Company claims to be the owner of the franchise and property of a number of other railroad companies created and organized under the laws of the State of North Carolina, including the Durham and Keysville Railroad Company, the Western North Carolina Railroad Company, the Atlantic, Tennessee & Ohio Railroad Company, the Yadkin Railroad Company, the Oxford and Henderson Railroad Company, and other companies, and that it has issued mortgage bonds aggregating about the sum of $120,000,000, and purporting to be secured by mortgages upon the franchise and property of the said Western North Carolina Railroad Company, and the other said companies so purchased, whereas in truth its pretended title to the franchise and property of the said *North* Western North Carolina Railroad Company, the said Atlantic, Tennessee and Ohio Railroad Company, and other companies is, as plaintiffs are advised, informed and believe, null and void, for the same reasons and upon the same grounds under which the adjudication of the supreme court of North Carolina with reference to the pretended title to the Western North Carolina Railroad Company is founded.

14th. That plaintiffs are advised, informed and believe the said Southern Railway Company, by reason of the fact that the railroads

claimed by it have not been purchased by authority of law, and that its pretended titles to the franchises and property of the same are null and void, is insolvent and unable to account to the Western North Carolina Railroad Company for a fair rental for the privilege of operating its road.

15th. That plaintiffs are advised informed and believe the said Western North Carolina Railroad Company has permitted the said Southern Railway Company to take possession of its rolling stock and other movable property and effects, and to mark it as the property of the said Southern Railway Company, and to comingle it with the other property of the said Southern Railway Com-
226 pany, so that it cannot be identified so that it may be sold under execution, and the lawful purchaser may acquire possession thereof.

16th. That the plaintiffs are advised that the plaintiff, Pearson, and other holders of the original private stock of the Western North Carolina Railroad Company not represented, as aforesaid, at any pretended reorganization of the company in the year 1880, are entitled to hold their said stock discharged of any lien created by either of said mortgage deeds executed to the Central Trust Company of New York (if any lien was created by either of said deeds) and are entitled to have a receiver appointed to collect a fair rental for the franchises and property of the said Western North Carolina Railroad Company from the persons or corporation now operating the said road, and to apply the same under the direction of the court and in accordance with the rights of the parties claiming the same.

17th. That the plaintiff, Cleyme James, administratrix of W. A. James, has recovered judgment in the superior court of Rowan county against the defendant, The Western North Carolina Railroad Company, which bears date the 21st of February, 1898, for the sum of $15,000 and costs of action, in an action brought for the negligent killing of her intestate, William A. James, and plaintiffs are advised, informed and believe, that the said judgment constitutes a lien upon the franchise and property of said company superior to the lien of either of said mortgages, even though the said mortgages should be declared valid liens.

18th. That by reason of the fraudulent concealment of the property of the Western North Carolina Railroad Company by the said Southern Railway Company, and comingling of the same with other property claimed by the said Southern Railway Company, plaintiff, Clemye James, administratrix as aforesaid, is unable to distinguish the rolling stock and property of the said Western North Carolina Railroad Company, and in case of a sale of its franchises and property upon execution issued upon her said judgment she is unable to identify or secure the property which would be subject to such execution.

19th. That the said pretended mortgage deeds and the said pretended sale under said second mortgage which has since been adjudicated and declared by the supreme court of North Carolina to be null and void, have cast a cloud upon the title to the franchise and property of the said Western North Carolina Railroad Com-

pany, so until that the rights of the parties are adjudicated
227 and determined, the said franchise and property may not, if sold under execution issued upon the judgment rendered as aforesaid in favor of the plaintiff, James, administratrix, may not, as plaintiffs are advised, bring a sufficient sum to satisfy the said judgment and, as plaintiffs are advised in the event that by such sale the said judgment should not be satisfied, the said Clemye James would be entitled to demand the payment of any balance out of any fund due the Western North Carolina Railroad Company from any tenant, whether an artificial or natural person who may have been permitted, with the consent of the said Western North Carolina Railroad Company, to operate its road as a carrier of freight and passengers.

20th. That the plaintiffs are advised and believe that the said Western North Carolina Railroad Company is insolvent, and that its directors have been guilty of mismanagement of its affairs for the fraudulent purpose of getting the control and management of its franchise and property, and preventing the creditors of the said company from collecting claims against it, and that it has ceased to transact the business for which it was incorporated, and that its financial embarrassments are such as to render it impracticable for it to resume the operation of its roads, and plaintiffs, therefore, are advised, informed and believe that the property of the said Western North Carolina Railroad Company cannot be preserved for the benefit of its creditors and stockholders, unless the same be placed in the hands of a receiver or receivers to be appointed by this court.

Wherefore, plaintiffs pray that a permanent receiver be appointed to take charge of the franchise and property of the said Western North Carolina Railroad Company, and to operate the same under the orders of the court.

2nd. That a referee be appointed to report to the court the nature and the character of the indebtedness of the said Western North Carolina Railroad Company, and that all creditors who will make themselves parties to this action may be authorized to prove their claims before such referee, and that all stockholders may prove before him the number and nature of their respective shares of stock, and that the said referee be directed to report to the court what claims, if any, constitute liens upon the franchise and property of the said company, and the order of priority of liens, if any exist.

3rd. For such other and further relief as to the court may seem just.

228 4th. For costs of action.

A. C. AVERY,
B. F. LONG,
LEE S. OVERMAN,
Attorneys for Plaintiffs.

Clemye James, administratrix of W. A. James, one of the plaintiffs above named, maketh oath that the facts set forth in the fore-

going complaint as of her own knowledge are true, and those stated on information and belief she believes to be true.

MRS. CLEMYE JAMES.

Sworn to and subscribed before me this 5th day of March, 1898.

J. L. RENDLEMAN,
Notary Public.

Endorsement: Filed in this office M'ch 12th, 1898, as of M'ch 11th, 1898, by permission of the court. H. C. Cowles, clerk.

EXHIBIT B.

In the Circuit Court of the United States, Western District of North Carolina.

CENTRAL TRUST COMPANY OF NEW YORK, Complainant,
against
WASTERN NORTH CAROLINA RAILROAD COMPANY and Another, Defendants. } In Equity.

An indenture, made the 22nd day of August, 1894, by and between Charles Price, special master, duly appointed in the suit in equity hereinafter mentioned, party of the first part, Central Trus. Company of New York, complainant in said suit, party of the second part, and Southern Railway Company, a corporation organized and existing under the laws of the State of Virginia, party of the third part;

Witnesseth: Whereas, on or about the 20th day of April, 1894, The Central Trust Company of New York, trustee, as complainant, filed its bill of complaint in equity in the circuit court of the United States of America for the western district of North Caro[illegible]a,
229 against the Western North Carolina Railroad Company, a corporation created by an- existing under the laws of the State of North Carolina, and The Richmond and Danville Railroad Company as defendants, in which suit in equity was sought to foreclose the second mortgage dated the 2nd day of September, in the year 1884, and upon or about that day duly executed, acknowledged and delivered by said Western North Carolina Railroad Company to said Central Trust Company of New York, in which suit it was proposed to sell the whole of the mortgaged property and premises, being the railroads, property, privileges and franchises of said Western North Carolina Railroad Company as more specifically described in said mortgage;

And whereas, such proceedings were had in the said cause that on the 5th day of May, 1894, a decree of foreclosure and sale was entered therein by the said circuit court of the United States for the western district of North Carolina;

And whereas, in and by the said decree the said Charles Price, party of the first part, was appointed special master to execute the

said foreclosure decree and to make the sale of property therein provided for and directed;

And whereas, in pursuance of such appointment the said special master afterwards, to wit: on the 21st day of August, 1894, at eleven o'clock in the morning, after due advertisement and notice of sale as prescribed in the said decree, at public auction, at the passenger station of the said Western North Carolina Railroad Company, in Statesville, North Carolina, on the day and at the hour fixed by the said special master in his advertisement of sale in accordance with the request of the solicitors for the complain-t, and in the manner specified and directed in the said decree, did sell all and singular the railroad, equipment, property, premises, rights, privileges and franchise which the said special master was directed by the said decree to sell, upon the terms and conditions in said decree fully and at large set forth, to which decree reference is hereby specially and expressly made;

And whereas, at such sale the said Southern Railway Company, party of the third part, became the purchaser of all such railroad, property and franchises offered and sold as a single parcel for the sum of five hundred thousand dollars ($500,000);

And whereas, the said party of the third part in part discharge of its said bid has paid to the said special master the sum of fifty thousand dollars ($50,000), and has also delivered to him four million one hundred and ten thousand dollars ($4,110,000)
230 par value of bonds of the Western North Carolina Railroad Company secured by its second mortgage, dated September 2, 1884, to the Central Trust Company, as trustee, for endorsement or proportionate credit thereon;

And whereas, the said special master did duly make his report of said sale to the said circuit court for the western district of North Carolina, and the said sale has been by decree entered of record, duly approved and confirmed by the said court, subject to the compliance by the purchaser with all the terms and conditions of said foreclosure decree and sale and the said decree of confirmation;

And whereas, an order has order been made by said court in the said suit authorizing and directing the said Charles Price, party of the first part, as special master, upon the terms and conditions set out in the said decree of confirmation, to execute, acknowledge and deliver a conveyance of all and singular the property, premises, rights, privileges and franchises so sold to the said purchaser thereof, subject to the mortgage liens as specified in and restricted by the said decree of foreclosure, and subject also to the payment of all claims filed in the said cause, but only when and as the said United States circuit court for the district of North Carolina should allow such claims, and adjudge the same to be prior in lien or superior in equity to the said mortgage foreclosed in said cause, and in accordance with the order or orders of the court allowing such claims and adjudging with respect thereto, and subject also to all debts and obligations incurred or to be incurred by the receivers having possession of such property which had not been, or should

not have been, paid by them, and which should be adjudged by the said court to be debts or obligations properly chargeable against the property purchased, and to be prior or superior to the lien of the said mortgage thereby foreclosed, but not subject to any leases or contracts described or referred to in said decree not expressly assumed or adopted by the purchaser;

And whereas, the said Southern Railway Company, as such purchaser, has complied with and fulfilled all the terms and conditions of the said order and decree, so far as the same are now ripe for performance, and is entitled to a conveyance for the property so *purchased by and* confirmed to it:

Now, therefore, this indenture witnesseth: That the said party of the first part, to wit: Charles Price, as such special master as aforesaid, and The Central Trust Company, complainant, as trustee, party of the second part, for and in consideration of the sum of five
231 hundred thousand dollars ($500,000), paid and to be paid in accordance with the terms of the said decree, and in consideration that the said party of the third part, as purchaser, will in all respects comply with the conditions of said decree of foreclosure and sale, have granted, bargained, transferred, sold and conveyed, and by these presents do hereby grant, bargain, transfer, sell and convey, unto the said Southern Railway Company, a corporation of the State of Virginia, and to its heirs, successors and assigns forever,

All and singular the railroad of the said Western North Carolina Railroad Company in the State of North Carolina, extending from Salisbury, in Rowan county, to and through Statesville, in Iredell county, to Asheville, on or near the French Broad river, in Buncombe county; thence along the French Broad river to Paint Rock, in Madison county, and also from said Asheville westward to the Tennessee river at or near the mouth of the Nantahala river, and thence westward to Murphy, in Cherokee county; and all real estate now owned or acquired for the purposes of said railroad, including all station, depot or other grounds held and used in connection therewith; and all rails, railway tracks, sidings, switches, bridges, fences, turn-tables, water tanks, viaducts, culverts, superstructures, passenger and other depots, station and freight houses, machine shops, buildings, fixtures, rolling stock, equipment, machinery, tools and implements whatsoever, now owned or acquired for the purposes or business of the said Western North Carolina Railroad Company in connection with the said railroad and all the franchises, rights, privileges, easements, income, earnings and profits of the said Western North Carolina Railroad Company, connected with issuing from or relating to the said above-described railroad.

The foregoing properties, real, personal, choses in action and franchises, being embraced in the lien of the second mortgage of the Western North Carolina Railroad Company executed September 2, 1884, and being sold in foreclosure of the same.

A more full and particular description of the property intended to be conveyed by this instrument being contained in said decree of the 5th of May, 1894, to which reference is hereby made, together with all the corporate estate, equity of redemption, rights, privi-

leges, immunities and franchises of said Western North Carolina Railroad Company, and all the tolls, fares, freights, rents, income, issues and profits of the said railroad, and all interests and claims and demands of every nature and description, and all the reversion and reversions, remainder and remainders thereof, in-
232 cluding all the said mortgaged premises and property in said decrees directed to be sold, at any time owned or acquired by and now in the possession of said Western North Carolina Railroad Company.

To have and to hold all and singular the above-mentioned railroad, premises, rights, privileges, interests, franchises, lands, tenements, hereditaments, appurtenances and property of every description, whether real, personal or mixed, herein conveyed, or intended to be conveyed, unto the said Southern Railway Company, party of the third part, its heirs, successors and assigns forever, which company is hereby invested with the same as fully and completely as said Western North Carolina Railroad Company and The Richmond and Danville Railroad Company, defendant in said suit in equity held or enjoyed, or were respectively entitled to hold or enjoy, or were seized of or entitled to, at the time of the entry of the said decree, or at the time of the commencement of said suit, freed and discharged from the lien and encumbrance of the said mortgage or deed of trust foreclosed or barred by the said decree, and freed from all equity of redemption of said mortgagor, The Western North Carolina Railroad Company, and of all equity of redemption, and of all other claims of the Richmond and Danville Railroad Company, and of all persons whomsoever claiming or to claim under the said railroad companies, except as mentioned and reserved in said decree, as fully and absolutely as the said Charles Price, as special master, and the said Central Trust Company, complainant, as trustee, may or ought, by virtue of said decree, to bargain, sell, release, assign or convey, but not including in this conveyance any lease of any other railway, the purchaser having elected not to assume or adopt any such lease.

It is hereby understood and agreed that no personal covenant or liability is to be implied from this deed against the said parties of the first or second part, except that they have not made any prior conveyance of the property herein mentioned, or of any part thereof.

And, whereas, in order to expedite the recording of this deed, four counterparts thereof are, by order of the United States circuit court for the western district of North Carolina, simultaneously executed, acknowledged and delivered by the party of the first part to the party of the third part:

Now, therefore, this indenture further witnesseth, that although four counterparts are simultaneously executed, acknowledged
233 and delivered by the parties of the first and second parts to the party of the third part, to the end that all or any one or more thereof may be recorded, any one or more of such counterparts, when executed, acknowledged and delivered, shall severally or col-

lectively be deemed to be an original, and for all intents and purposes be one instrument.

In witness whereof, the party of the first part hereto has hereunto set his hand and seal the day and year first above written, and at the same time the party of the second part has caused its corporate seal to be hereunto affixed, and these presents to be executed and delivered by its duly authorized agent.

CHARLES PRICE, [L. S.]
Special Master.

In presence of—
HENRY W. CALHOUN,
FRANCIS LYNDE STETSON,
Attesting Witnesses.

CENTRAL TRUST COMPANY
OF NEW YORK, *Trustee,*

[Seal Central Trust Company of New York. Fide et Fiducia.]

By E. FRANCES HYDE,
2nd Vice-President.

STATE OF NORTH CAROLINA, }
County of Rowan, } ss:

I, Orin D. Davis, a notary public of the county of Rowan, in the State of North Carolina, do hereby certify that Charles Price personally appeared before me this day and acknowledged the due execution of the foregoing deed of conveyance.

Witness my hand and official seal this 22nd day of August, 1894.

[Seal of Orin D. Davis, Notary Public, Salisbury, N. C.]

ORIN D. DAVIS,
Notary Public, Rowan Co., N. C.

STATE OF NORTH CAROLINA, }
Rowan County. }

Superior Court.

I, W. G. Watson, clerk of the superior court in and for the
234 county and State aforesaid, do hereby certify that Orin D. Davis, whose genuine signature appears to the foregoing certificate, is, and was at the time of signing the same, an acting notary public in and for the county and State aforesaid, and duly qualified according to law.

Witness my hand and seal of said court this the 3rd day of September, 1894.

[Seal Rowan Superior Court, North Carolina.]

W. G. WATSON,
Clerk Superior Court.

STATE OF NEW YORK, }
City and County of New York, } ss:

I, George H. Corey, a commissioner appointed by the governor of the State of North Carolina for the State of New York, aforesaid, do hereby certify that E. Frances Hyde, whose name is signed to the foregoing deed of conveyance as second vice-president of the Central Trust Company of New York, the corporation described in and which executed the said deed as trustee, personally appeared before me this day and acknowledged the due execution of said deed to be his free act and deed and the free act and deed of the said Central Trust Company of New York.

And the said E. Frances Hyde, being by me first duly sworn, did depose and say that he resides at No. 522 Fifth avenue, in the city of New York; that he is one of the vice-presidents of the said Central Trust Company of New York; that he knows the corporate seal of said company; that the seal affixed to the foregoing instrument is the corporate seal of said company, and was thereto affixed by authority of the board of directors of said company, and that he signed his name thereto by like authority in behalf of said corporation.

In witness whereof I have hereunto set my hand and seal of office the 18th day of September, 1894.

[Seal of George H. Corey, Commissioner for North Carolina.]

GEO. H. COR-Y,
Commissioner for the State of New *Carolina,*
66 *Wall Street, N. Y.*

NORTH CAROLINA, }
Rowan County. }

I, W. G. Watson, clerk superior court of Rowan county, do hereby certify that the foregoing certificates of Orin D. Davis, notary
235 public for Rowan county, State of North Carolina, and of George H. Corey, commissioner for the State of North Carolina, and of W. G. Watson, clerk superior court of Rowan county, North Carolina, are adjudged to be correct.

Let the deed, with the said certificates and this certificate, be registered.

Witness my hand and seal this the 5th day of November, 1894.

[Seal Rowan Superior Court, North Carolina.]

W. G. WATSON,
Clerk Superior Court of Rowan Co.

Filed for registration in the office of register of deeds for Rowan county on the 5th day of Nov., 1894, at 9 o'clock a. m., and recorded in Book 76, page 505, &c., and following.

HORATIO N. WOODSON,
Register of Deeds of Rowan County.

STATE OF NORTH CAROLINA, }
Rowan County. }

OFFICE OF THE REGISTER OF DEEDS, *March 8th*, 1898.

I, Horatio N. Woodson, register of deeds in and for the county aforesaid, do hereby certify that the foregoing contains a true and perfect copy of a deed from Charles Price, special master to Southern Railway Company, as copied from the records on file in said office. See Book No. 76, page 505, &c.

In witness whereof I hereunto set my hand and official seal date above written.

HORATIO N. WOODSON,
[SEAL.] *Register of Deeds, Rowan County, N. C.*

Endorsement: Filed in this office Mar. 12, 1898, as of Mar. 11, 1898. H. C. Cowles, clerk.

And on March 12th, 1898, the following restraining order made by the court is issued, with certified copies for respondents, to wit:

236 *Restraining Order.*

United States Circuit Court, Western District of North Carolina.

IN THE MATTER OF THE SUIT OF THE CENTRAL TRUST COMPANY of New York
against
WESTERN NORTH CAROLINA RAILROAD COMPANY and Another.

Order.

On reading the petition and bill supplemental, filed by leave of the court in the above-entitled suit, and the exhibits filed as part thereof, it is ordered that the suit as entitled above, depending in the circuit court of the United States for the western district of North Carolina, be advanced and placed upon the docket, and that the complainant's and petitioner's bill and petition for injunction and restraining order, pursuant to the prayer of the petition and bill, be set down for hearing at 12 o'clock m. before me, at Greensboro, North Carolina, within said district, on Tuesday after the first Monday in April, it being the 5th of April, 1898, or as soon thereafter as counsel can be heard.

This being a proper case for granting a temporary restraining order, it is ordered and decreed that until the hearing of such petition and bill for injunction and the further order of the court thereon,

The respondents, the said S. T. Pearson, Mrs. Clemye James and Mrs. Fannie E. Howard, personal representatives as set out in the bill, are restrained and prohibited from proceeding any further in the prosecution of the action set out in the bill depending in the superior court of Rowan county, or from beginning any other action

or proceeding for a similar purpose, either by themselves, their agents or attorneys.

It is further ordered that a certified copy of this order be served upon the respondents, the said S. T. Pearson and Mrs. Clemye James and Mrs. Fannie E. Howard by reading and delivering a copy thereof.

It is further ordered that subpœnas and notices issue to the said respondents, as prayed for in the bill.

CHARLES H. SIMONTON,
Circuit Judge.

March 11th, 1898.

Endorsement: Filed March 12th, 1898, as of March 11th, by permission of the court. H. C. Cowles, clerk.

237 *Marshal's Return.*

Received Mar. 12, 1898. Served by delivering copies to Mrs. Clemye James at Asheville, N. C., Mar. 14th, 1898, and by delivering copy to S. T. Pearson at Morganton, N. C., Mar. 14th, 1898; and by delivering copy to Mrs. Fannie E. Howard at Salisbury, N. C., Mar. 15th, 1898. The restraining order served by reading and delivering copies to each of said parties at said times and places.

J. M. MILLIKAN, *Marshall*,
By P. D. ATWELL, *D. M.*

And on May 21st, 1898, the following agreement of attorneys was filed, to wit:

Agreement of Attorneys.

In the Circuit Court of the United States, Western District of North Carolina, at Asheboro, March 25th, 1898.

THE CENTRAL TRUST CO. OF N. Y.
vs.
S. T. PEARSON, MRS. CLEMYE JAMES, Adm'x, ET AL.

It is agreed between counsel for S. T. Pearson and Clemye James, adm'x, of W. A. James, wherein a subpœna has been served upon them in the above-entitled cause, and Chas. Price, attorney of the plaintiff above named, that no motion is to be made or action taken in reference to any motion or order heretofore made in said cause, until Tuesday of the first week of the June term, 1898, of the circuit court at Charlotte, N. C.

It is further agreed that this agreement is entered into by the said counsel of S. T. Pearson and Clemye James, adm'x, upon the express condition that the said counsel for said defendants are not pre-luded by this agreement from denying the jurisdiction of the circuit court in the premises, and the authority of the circuit court

especially to reinstate upon the equity docket of said court the cause entitled in the bill of complaint served upon the defendants as follows, to wit:

In the matter of the suit of Central Trust Co., of N. Y. complainant, *vs.* The Western North Carolina Railroad Company and another, respondents, and upon the express condition that this agreement is not to be deemed or treated as a general appearance, either in the above-entitled cause, or the cause which it is sought
238 to reinstate upon the equity docket of the circuit court of the United States at Statesville, nor to pre-lude the said counsel from denying the jurisdiction of the court in either of the said causes by entering a special appearance, or otherwise they may be advised to be the best interest of their clients.

And it is further agreed that the time for filing answer, if said counsel deem it proper to answer, in the above-entitled cause, is continued to the said day of hearing, without prejudice in any manner whatever to the said counsel to controvert the jurisdiction of the said court, and to take any such actions as it is proposed to take in either of said suits.

A. C. AVERY,
LEE S. OVERMANN,
B. F. LONG,
For Respondents.

CHAS. PRICE,
Sol. for Complainants.

Endorsement: Filed May 21, '98. H. C. Cowles, clerk.

And on June 16, 1898, in open court, was filed the following exception to supplemental bill, to wit:

Exception to Supplemental Bill.

In the Circuit Court of the United States, Western District of North Carolina, at Statesville, N. C.

IN THE MATTER OF THE SUIT OF THE CENTRAL TRUST CO. OF N. Y., Complainant,
vs.
WESTERN N. C. R. R. Co. & Others, Respondents.

Exceptions for scandal.

The respondents, S. T. Pearson, Mrs. Clemye James, adm'x, and Fannie E. Howard, adm'x, hereby take exception for scandal to the bill of complaint of the above-named plaintiff filed in this cause on or about the 10th March, 1898, and filed as a supplemental bill.

First. For that the whole of the eleventh (11th) paragraph of the said bill, appearing on page 8 thereof, is scandalous, impertinent and untrue.

239 In all of which particulars these exceptants except to the said bill as scandalous and impertinent, and humbly insist that the said scandalous and impertinent matter as set out in said 11th paragraph be expunged therefrom.

A. C. AVERY,
L. S. OVERMAN,
B. F. LONG,
Counsel for Respondents.

Endorsement: Filed June 16, '98, in open court. H. C. Cowles, clerk.

And now on June 16th, 1898, is filed the answer of Mrs. Clemye James, administratrix of W. A. James, deceased, as follows, to wit:

Answer of Clemye James, Adm'x.

In the Circuit Court of the United States, the Western District of North Carolina, at Statesville, N. C.

IN THE MATTER OF THE SUIT OF THE CENTRAL TRUST COMPANY of New York, Complainant,
vs.
THE WESTERN NORTH CAROLINA RAILROAD CO. ET ALS., Respondents.

The joint and several answers of Clemye James, administratrix of W. A. James, and Fannie E. Howard, administratrix of John H. A. Howard.

The defendants above named, respectively, now and at all times hereafter reserving to themselves the right to except to the jurisdiction of the court to restrain the collection of the judgments lawfully obtained by them, respectively, in the courts of the State of North Carolina, or of any proceeding, legal or equitable, instituted by them in said courts, and saving to themselves all manner of benefit or advantage of exception that may be had or taken to the many errors, uncertainties and imperfections in the said bill contained for answer thereto, or to so much thereof as these defendants are respectively advised it is material or necessary for them, or either of them, to answer; severally answering the complaint of the Central Trust Co. say:

240 I. That the allegations contained in the first paragraph of the supplemental bill or petition of the plaintiff above named are true, but the complainant omits to set forth that the sale was made under a second mortgage, subject to a first mortgage, as will appear from the complaint decree of foreclosure and the deed filed as an exhibit to the said supplemental bill of complaint or petition.

II. That the allegations contained in the second paragraph of the said bill, that the Southern Railway Co. became the sole owner of

the Western North Carolina railroad and of the property incident thereto, together with the franchises of the corporation, subject to the lien of the first mortgage, as set out in this proceeding, is not true. The other allegations contained in the said paragraph are admitted to be true.

III. That the allegations contained in the third paragraph are not, as respondents are advised, informed and believe, true, and respondents especially deny that the Southern Railway Co. has been operating the Western North Carolina railroad since the 24 day of August, 1894, as sole owner, and aver that the supreme court of North Carolina, in the exercise of its rightful power and jurisdiction, has adjudged and declared that the said Southern Railway Company has been operating said road, as they are advised, as the lessee or tenant at sufferance.

IV. That they deny that the Southern Railway Company, by virtue of having treated with this court as the purchaser under said decree, may rightfully invoke the jurisdiction of this court to interfere with or restrain any proceeding in the courts of North Carolina in the exercise of their rightful jurisdiction.

Answering so much of the said supplemental bill as is a joint complaint of the Southern Railway Company and the Central Trust Company of New York, these respondents severally say:

1. That it is true that the said Southern Railway Company is a corporation created and existing under the laws of the State of Virginia, and that it is doing business in the State of North Carolina, but that it is also true that in the pleadings filed in the cause wherein the judgment in favor of your respondents, the collection of which it is now sought to restrain, were obtained, the president of the Western North Carolina Railroad Co. contended that the said company was still in existence, and subsequently, upon the
241 trial of the said actions, insisted that the title to the said Western North Carolina railroad and its franchises and property had, upon the sale under the decree in this action, vested in the Southern Railway Company, and that upon said purchase the said Southern Railway Company *ipso facto* became a domestic corporation of the State of North Carolina.

2. That in the said actions brought by the respondents, respectively, against the Western North Carolina Railroad Company for the negligent killing of their respective intestates, the said Clemye James, administr-ix, recovered judgment for the sum of $15,000, and the said Fannie E. Howard, administratrix, recovered judgment for the sum of $5,000, the collection of which the plaintiffs now seek to enjoin and also to prevent or forbid the superior court of North Carolina, in the exercise of its rightful equitable jurisdiction from appointing a receiver to take charge of the property of the said North Carolina Railroad Co. which cannot be subjected to said judgment by an ordinary execution issuing from a court of law. But these respondents deny that the said Southern Railway Co. had the power to purchase or to acquire the title to the said Western North Carolina Railroad Company with the property and franchise of the company, and aver that the supreme court of North Carolina,

in the exercise of its rightful jurisdiction, has adjudged that the said Southern Railway Co. acquired no title by purchase.

3. That the allegations contained in the third paragraph of the said joint complaint are true, except the allegation that under and by virtue of section 697 of the Code of North Carolina, the corporation known as the Western North Carolina Railroad Co. immediately and *ipso facto* upon the execution of the deed of conveyance by the master to the Southern railway was dissolved; but, on the contrary, these respondents aver that, as they are informed, advised and believe, the supreme court of the State of North Carolina, in the exercise of its rightful jurisdiction, has adjudged that the said corporation was not so dissolved immediately upon the execution of said conveyance, and has never, up to the present time, been dissolved.

4. That these respondents admit that the conveyance attached as an exhibit to the complaint was executed and delivered, but aver that the said deed was void and ineffectual to pass the title to the said railroad, its franchises or property, because of the want of authority on the part of the Southern Railway Company, under the laws of the State of North Carolina, to become the purchaser
242 or owner of any railroad line and franchises created and existing under the laws of the State of North Carolina; and these respondents further deny the allegation of the complainants that the Southern Railway Company has acquired the ownership or any right, title and interest in the property and franchises of the Western North Carolina railroad, or title to operate the same, except as a lessee or tenant of the Western North Carolina Railroad Company; and that the consequence of the assumption on the part of the Southern Railway Company *to* the right to operate the said road, and of operating it at the time when the intestates of these respondents were killed, was in contemplation of law, as adjudicated by the supreme court of North Carolina in the exercise of its rightful jurisdiction, to make the Western North Carolina Railroad Company and the Southern Railway Company jointly and severably answerable for the negligence of the said Southern Railway Company, which caused the death of both of said intestates.

5. That the allegations contained in the fifth paragraph of the said joint complaint are true.

6. That it is true that the respondent, Fannie E. Howard, administratrix, is not a party plaintiff in the said action begun in the superior court of Rowan county, nor is it true that she proposes to assert any pretended claim in said court; but respondents aver that she did recover judgment for the sum of $5,000, and that, as they are advised, there was no appeal from said judgment.

7. That the allegations contained in the seventh paragraph of the said joint complaint are not true, except that S. T. Pearson claims to own one share of stock in the said Western North Carolina Railroad Company.

8. Answering paragraph eighth in said joint complaint, respondents say that it is not true, as they are severally advised, informed and believe, that the Southern Railway Company is a solvent cor-

poration; but, on the contrary, as respondents are advised, informed and believe, the said Southern Railway Company has issued and sold bonds amounting in the aggregate to about one hundred millions of dollars, and, as set forth in an authorized statement published by them, in Poor's Manual, has attempted to secure said bonds by mortgages upon certain railroads, together with their respective franchises and property therein mentioned, to such of which railroad lines as are located in the State of North Carolina, the pretended titles of the said Southern Railroad Company are null and void, for the same reason that the said conveyance of the
243 Western North Carolina Railroad Company to the Southern Railway Company was held by the supreme court of North Carolina to be ineffectual and void.

9. That the allegations contained in paragraph nine of the said joint complaint are true.

10. That the allegations contained in paragraph 10 of the said joint complaint are true.

11. That the allegations contained in paragraph 11 of the said joint complaint are false and unfounded, as these respondents are informed and believe; and the court is respectfully requested to have said allegation stricken out as impertinent and slanderous.

12. Answering the 12th paragraph of the said complaint, these respondents severally say that, as they are informed and believe, none of the plaintiffs named in the said paragraph are worth any property over and above their respective homesteads, exemptions and liabilities; but these respondents are advised, informed and believe that it is the office of the judges of the superior courts of North Carolina to look to the protection of litigants in their courts, and that the circuit court of the United States has no lawful authority to exercise a supervisory jurisdiction over them in the exercise of such rightful authority; and these respondents further aver, in answer to said paragraph, that since the filing of the creditors' bill by them in Rowan county, other parties who are solvent and able to respond in damages, have made themselves parties plaintiff in said action.

13. That it is true that S. T. Pearson and Clemye James, administratrix of W. A. James, did, on the 5th day of March, 1898, file a complaint in said action instituted in the superior court of Rowan county, a copy of which is hereto attached and marked Exhibit "A."

That these respondents deny the truth of any inference of law or fact set forth in said paragraph, except in so far as the said inference may be fairly drawn from the said complaint, so filed as an exhibit.

14. That it is true that the rights of the plaintiffs in said action to the relief therein demanded, was based upon the decision of the courts of North Carolina, which courts, respondents are advised, are respected by the Federal courts and are not disturbed when in the exercise of their rightful jurisdiction.

15. Answering paragraph 15, respondents say that they
244 are advised that the Federal courts take cognizance of the decisions of the highest appellate courts of the State in which

they are held, and these respondents deny the right of the complainants to place upon said decisions any other construction than that of which they are plainly susceptible.

16. That as these respondents are advised, informed and believe, the courts of the United States are bound to respect and follow the decisions of the highest appellate courts of the State placing a construction upon the constitution and statutes of said State, unless said decisions manifestly affect the rights of parties under the Constitution of the United States, and of the laws or treaties made in pursuance thereof, and these respondents are advised that the said decision of the supreme court of the State of North Carolina was founded upon the plainest principles of elementary law, such as the said Southern railway and its learned counsel are supposed to have notice of the existence of, and to have acted in contemplation of; and these respondents are advised, informed and believe that there is no legal obligation resting upon the circuit court of the United States to warrant and defend the quiet enjoyment of the possession of a railroad to the purchaser, because said purchaser claims to have bought under a decree of said court.

17. Answering paragraph 17, these respondents say that it is true, as appears from their bill of complaint, that the action was brought to secure the appointment of a receiver by the judge of the superior court, presiding in Rowan county, but that as they are informed, advised and believe the other allegations contained in said paragraph 17 of the complaint are not true.

18. The allegations contained in the 18th paragraph of the said joint complaint, as respondents are advised, informed and believe, are not true.

Wherefore, these respondents pray,

First. To be dismissed with their reasonable costs.

Second. For any relief as to the court may seem just.

Clemye James maketh oath that the facts set forth in the foregoing answer, as of her own knowledge, are true, and that those stated on information and belief, she believes them to be true.

CLEMYE JAMES.

245 Sworn to and subscribed before me this, the 13th day of June, 1898.

J. McD. WHITSON,
[SEAL.] *Notary Public.*

Endorsement: Filed June 16th, 1898. H. C. Cowles, clerk.

And on this 16th June, 1898, is filed the answer of Mrs. Fannie E. Howard, administratrix of John H. A. Howard, as follows, to wit:

Answer of Fannie E. Howard, Administratrix of John H. A. Howard.

In the Circuit Court of the United States, the Western District of North Carolina, at Statesville, N. C.

IN THE MATTER OF THE SUIT OF THE CENTRAL TRUST COMPANY of New York, Complainant,
vs.
THE WESTERN NORTH CAROLINA RAILROAD CO. ET ALS., Respondents.

The joint and several answers of Clemye James, administratrix of W. A. James, and Fannie E. Howard, administratrix of John H. A. Howard.

The defendants above named, respectively, now, and at all times hereafter reserving to themselves the right to except to the jurisdiction of the court to restrain the collection of the judgments lawfully obtained by them respectively in the courts of the State of North Carolina or of any proceeding, legal or equitable, instituted by them in said courts, and saving to themselves all manner of benefit or advantage of exception that may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto or to so much thereof as these defendants are respectively advised it is material or necessary for them or either of them to answer, severally answering the complaint of the Central Trust Co. say:

I. That the allegations contained in the first paragraph of the supplemental bill or petition of the plaintiff above named
246 are true, but the complainant omits to set forth that the sale was made under a second mortgage and subject to a first mortgage, as will appear from the complaint, decree of foreclosure and the deed filed as an exhibit to the said supplemental bill of complaint or petition.

II. That the allegations contained in the second paragraph of the said bill, that the Southern Railway Co. became the sole owner of the Western North Carolina railroad and of the property incident thereto, together with the franchises of the corporation, subject to the lien of the first mortgage, as set out in this proceeding, is not true. The other allegations contained in the said paragraph are admitted to be true.

III. That the allegations contained in the third paragraph are not, as respondents are advised, informed and believe, true; and respondents especially deny that the Southern Railway Co. has been operating the Western North Carolina railroad since the 24 day of August, 1894, as sole owner, and aver that the supreme court of North Carolina, in the exercise of its rightful power and jurisdiction, has adjudged and declared that the said Southern Railway Company has been operating said road, as they are advised, as the lessee or tenant at sufferance.

IV. That they deny that the Southern Railway Company, by virtue of having treated with this court as the purchaser under said decree, may rightfully invoke the jurisdiction of this court to interfere with or restrain any proceeding in the courts of North Carolina in the exercise of their rightful jurisdiction.

Answering so much of the said supplemental bill as is a joint complaint of the Southern Railway Company and the Central Trust Company of New York, these respondents severally say:

1. That it is true that the said Southern Railway Company is a corporation created and existing under the laws of the State of Virginia, and that it is doing business in the State of North Carolina; but that it is also true that in the pleadings filed in the cause wherein the judgment in favor of your respondents, the collection of which it is now sought to restrain, were obtained, the president of the Western North Carolina Railroad Co. contended that the said company was still in existence, and subsequently, upon the trial of the said actions, insisted that the title to the said Western North Carolina railroad and its franchises and property had, upon the sale under the decree in this action, vested in the Southern Rail-
247 way Company, and that upon said purchase the said Southern Railway Company, *ipso facto*, became a domestic corporation of the State of North Carolina.

2. That in the said actions brought by the respondents, respectively, against the Western North Carolina Railroad Company for the negligent killing of their respective intestates, the said Clemye James, administratrix, recovered judgment for the sum of $15,000, and the said Fannie E. Howard, administratrix, recovered judgment for the sum of $5,000, the collection of which the plaintiffs now seek to enjoin and also to prevent or forbid. The superior court of North Carolina, in the exercise of its rightful equitable jurisdiction from appointing a receiver to take charge of the property of the said Western North Carolina Railroad Co., which cannot be subjected to said judgment by an ordinary execution issuing from a court of law. But these respondents deny that the said Southern Railway Co. had the power to purchase or to acquire the title of the said Western North Carolina Railroad Company with the property and franchise of the company, and aver that the supreme court of North Carolina, in the exercise of its rightful jurisdiction, has adjudged that the said Southern Railway Co. acquired no title by purchase

3. That the allegations contained in the third paragraph of the said joint complaint are true, except the allegation that under and by virtue of section 697 of the Code of North Carolina, the corporation known as the Western North Carolina Railroad Co. immediately and *ipso facto*, upon the execution of the deed of conveyance by the master to the Southern Railway Company, was dissolved; but on the contrary, these respondents aver that as they are informed, advised and believe, the supreme court of the State of North Carolina, in the exercise of its rightful jurisdiction, has adjudged that the said corporation was not so dissolved immediately upon the execu-

tion of said conveyance, and has never up to the present time, been dissolved.

4. That these respondents admit that the conveyance attached as an exhibit to the complaint was executed and delivered, but aver that the said deed was void and ineffectual to pass the title to the said railroad, its franchises or property, because of the want of authority on the part of the Southern Railway Company, under the laws of the State of North Carolina, to become the purchaser or owner of any railroad line and franchise created and existing
248 under the laws of the State of North Carolina; and these respondents further deny the allegation of the complainants that the Southern Railway Company has acquired the ownership or any right, title and interest in the property and franchises of the Western North Carolina railroad, or title to operate the same, except as a lessee or tenant of the Western North Carolina Railroad Company; and that the consequence of the assumption on the part of the Southern Railway Company of the right to operate the said road, and of operating it at the time when the intestates of these respondents were killed, was in contemplation of law, as adjudicated by the supreme court of North Carolina in the exercise of its rightful jurisdiction, to make the Western North Carolina Railroad Company and the Southern Railway Company jointly and severally answerable for the negligence of the said Southern Railway Company which caused the death of both of said intestates.

5. That the allegations contained in the fifth paragraph of the said joint complaint are true.

6. That it is true that the respondent, Fannie E. Howard, administratrix, is not a party plaintiff in the said action begun in the superior court of Rowan county, nor is it true that she proposes to assert any pretended claim in said court; but respondents aver that she did recover judgment for the sum of $5,000, and that as they are advised, there was no appeal from said judgment.

7. That the allegations contained in the seventh paragraph of the said joint complaint are not true, except that S. T. Pearson claims to own one share of stock in the said Western North Carolina Railroad Company.

8. Answering paragraph eighth in said joint complaint, respondents say that it is not true, as they are severally advised, informed and believe, that the Southern Railway Company is a solvent corporation, but, on the contrary, as respondents are advised, informed and believe, the said Southern Railway Company has issued and sold bonds amounting in the aggregate to about one *one* hundred millions of dollars, as set forth in an authorized statement published by them, in Poor's Manual, and has attempted to secure said bonds by mortgages upon certain railroads, together with their respective franchises and property therein mentioned, to such of which railroad lines as are located in the State of North Carolina, the pretended titles of the said Southern Railway Company, are null and void, for the same reason that the said conveyance of the Western North Carolina Railroad Company to the Southern Railway Com-

pany was held by the supreme court of North Carolina to be ineffectual and void.

249 9. That the allegations contained in paragraph 9 of the said joint complaint are true.

10. That the allegations contained in paragraph 10 of the said joint complaint are true.

11. That the allegations contained in paragra-h 11 of the said joint complaint are false, and unfounded, as these respondents are informed and believe; and the court is respectfully requested to have said allegations stricken out as impertinent and slanderous.

12. Answering the 12th paragraph of the said complaint, these respondents severally say, that, as they are informed and believe, none of the plaintiffs named in the said paragraph are worth any property over and above their respective homesteads, exemptions and liabilities: but these respondents are advised, informed and believe that it is the office of the judges of the superior courts of North Carolina to look to the protection of litigants in their courts, and that the circuit court of the United States has no lawful authority to exercise a supervisory jurisdiction over them in the exercise of such rightful authority; and these respondents further aver in answer to said paragraph that since the filing of the creditors' bill by them in Rowan county, other parties who are solvent and able to respond in damages, have made themselves parties plaintiff in said action.

13. That it is true that S. T. Pearson and Clemve James, administratrix of W. A. James, did, on the 5th day of March, 1898, file a complaint in said action instituted in the superior court of Rowan county, a copy of which is hereto attached and marked Exhibit "A."

That these respondents deny the truth of any inference of law or fact set forth in said paragraph, except in so far — the said inference may be fairly drawn from the said complaint, so filed as an exhibit.

14. That it is true that the right of the plaintiffs in said action to the relief therein demanded was based upon the decision of the courts of North Carolina, which courts respondents, are advised, *and* respected by the Federal courts, and are not disturbed when in the exercise of their rightful jurisdiction.

15. Answering paragraph 15, respondents say that they are advised that the Federal courts take cognizance of the decisions of the highest appellate courts of the State in which they are held, and these respondents deny the right of the complainants to place
250 upon said decisions any other construction than that of which they are plainly susceptible.

16. That as these respondents are advised, informed and believe, the courts of the United States are bound to respect and follow the decisions of the highest appellate courts of the State placing a construction upon the constitution and statutes of said State, unless said decisions manifestly affect the rights of parties under the Constitution of the United States, and of the laws or treaties made in pursuance thereof, and these respondents are advised that the said decision of the supreme court of the State of North Carolina was founded upon the plainest principles of elementary law, such as the

said Southern Railway Company, and its learned counsel are supposed to have notice of the existence of, and to have acted in contemplation of; and these respondents are advised, informed and believe, that there is no legal obligation resting upon the circuit court of the United States to warrant and defend the quiet enjoyment of the possession of a railroad to the purchaser, because said purchaser claims to have bought under a decree of said court.

17. Answering paragraph 17, these respondents say that it is true, as appears from their bill of complaint, that the action was brought to secure the appointment of a receiver by the judge of the superior court presiding in Rowan county, but that, as they are informed, advised and believe, the other allegations contained in said paragraph 17 of the complaint, are not true.

18. The allegations contained in the eighteenth paragraph of the said joint complaint, as respondents are advised, informed and believe, are not true.

Wherefore, these respondents pray, first, to be dismissed with their reasonable costs.

Second. For any relief as to the court may seem just.

A. C. AVERY,
B. F. LONG,
LEE S. OVERMANN,
For Respondents.

Fannie E. Howard maketh oath that the facts set forth in the foregoing answer as of her own knowledge, are true; and that those stated on information and belief, she believes them to be true.

FANNIE E. HOWARD.

251 Sworn to and subscribed before me this, the 13th day of June, 1898.

[SEAL.] W. G. WATSON,
Clerk Superior Court.

Endorsement: Filed June 16th, 1898. H. C. Cowles, clerk.

EXHIBIT A.

In the Superior Court, May Term, 1898.

NORTH CAROLINA, }
Rowan County. }

S. T. PEARSON and CLEMYE JAMES, Administratrix of W. A. James, }
vs. }
WESTERN NORTH CAROLINA RAILROAD COMPANY. }

The plaintiffs, on behalf of themselves and all other stockholders and creditors of the company above named as defendant, complains and alleges:

1st. That the Western North Carolina Railroad Company is a

corporation created by an act of the General Assembly of the State of North Carolina, passed at its session of 1854–'5, and published by the authority *by* said State as chapter 228 of the Laws of 1854–'5 at page 257, and that the said defendant company was duly organized under the authority of said act about the — day of ——, in the year 1856, and that plaintiffs have instituted an action by issuing a summons against said company.

2nd. That the said original charter was subsequently amended by an act of the General Assembly of North Carolina at its session of 1866–'7, and published by the authority of said State as chapter 94, Laws of 1866–'7, at page 52, but that both prior to and subsequent to the passage of said last-named act private individuals and municipal corporations had subscribed from time to time under the terms of the said charter of said company to the capital stock of said company so as to comply with the condition that the State of North Carolina should only subscribe to the said capital stock after solvent individual stockholders had subscribed a definite number of shares, when the said State, through its constituted authorities, was
252 empowered to subscribe twice the number of shares so subscribed by individual stockholders and municipal corporations.

3rd. That prior to the 4th day of March, in the year 1880, by means of a subscription made in the said proportion of two shares on the part of State and one on the part of the individual shareholders, a sufficient sum of money had been raised to complete the line of the said railway and equip and operate it from Salisbury, in Rowan county, to the Tennessee line at Paint Rock, and to grade a portion of the branch line projected from a point near Asheville, North Carolina, to Murphy, in Cherokee county, and that on said 4th day of March, 1880, there had been subscribed to the capital stock of the said company, as affiant is informed and believes, about the sum of $6,000,000.00 in shares of $100 each, of which said shares the State was the owner of two-thirds and the individuals of one third.

4th. That in section 8 of the said act passed on the 4th day of March, 1880, the legislature of the State of North Carolina attempted to authorize a reorganization of the defendant company upon a plan whereby the entire capital stock of said company should amount to only $4,000,000.00 of preferred stock, of which the aggregate amount of stock to be held in the reorganized company by the individuals and municipal corporation, who therefore subscribed and paid up shares amounting to $2,000,000.00 of its capital stock, should be only the sum of $212,500.00 to be divided *pro rata* amongst said individuals and municipalities in proportion to the amount theretofore actually subscribed and paid in by each. And it was further provided in said section that the company when reorganized under said act should be empowered, by a vote of the majority of the stockholders in interest, to issue second or common stock to an amount not exceeding $15,000.00 per mile of said road, and that said company, as reorganized, should be governed by a board of 9 directors to be elected by a majority vote of the stockholders in in-

terest, which 9 directors were to be the governing board, instead of 12 directors, 8 appointed by the governor of the State and 4 elected by private stockholders in accordance with provisions of the charter as amended prior to said 4th day of March, 1880.

5th. That the plaintiff, S. T. Pearson, is the owner of one share of the original capital stock of said company, subscribed and paid in about the — day of —— 1856, and which he has acquired by assignment from the original holder of said share. And that,

253 as plaintiffs are advised, informed, and believed, not only the share of stock of said company which has been assigned to the plaintiff Pearson as aforesaid, but a large number of other shares, amounting in the aggregate to $300,000.00, or 300 shares of the capital stock or more, were not represented in any meeting of the shareholders of the said defendants company at which any other stockholders assented or purported to agree to accept the said act passed on the 4th day of March, 1880, as an amendment to the charter of the defendant company, or to reorganize the said company under the provisions of said act. The plaintiffs are advised, informed and believe that neither the plaintiff, Pearson, nor any other holders of shares of capital stock subscribed and paid up before the said 4th day of March, 1880, and which was not represented in any meeting of stockholders which attempted to accept the said act of the 4th day of March, 1880, as an amendment to the charter, are bound by its provisions.

6th. That, as plaintiffs are advised, informed and believe, a portion of the private stockholders of the said company met soon after the passage of said act of March 4th, 1880, and attempted to ratify the same and bind the holders of from 300 to 500 shares not represented and not consenting to said action, but as that the said attempt to bind the plaintiff Pearson and other stockholders not so represented, and who are invited to become parties plaintiff to this action, was ineffectual in law to subject them to the terms of said act or subsequently to subject shares of the capital stock of the company held by them to the lien of any mortgage or incumbrance which the company purporting to have been reorganized under said act attempted to create by authorizing the execution of bonds purporting to be secured by mortgaging the franchise and property of said company.

7th. That, as plaintiffs are advised, informed and believe, a portion of the private stockholders of the said Western North Carolina Railroad Company met on the — of —— 1880, and attempted to reorganize the said Western North Carolina Railroad Company in pursuance of the provisions of the said act of March 4th, 1880, but without the presence of the assignor of the said Pearson or other stockholders holding in the aggregate from 300 to 500 shares of the capital stock of said company, and thereafter proceeded to take possession of the road-bed and property of the said company and to operate its road and to supervise and direct the work of construction on the uncompleted portions of its line.

254 8th. That thereafter, to wit, on the first day of September, 1884, the said company purporting to have been reorganized

as aforesaid, caused to be executed by its officers bonds to the amount of $12,500.00 per mile of its completed road, running thirty years, and bearing 6% per annum interest, less $850,000.00 in said bonds reserved under an agreement with the State of North Carolina, and attempted to secure the payment of the interest on said bonds by executing a mortgage deed conveying the property and franchise of said company to the Central Trust Company of New York.

9th. That on the 2nd day of September, 1884, the said company, so purporting to have been reorganized, attempted to authorize the issue of bonds of said company, to the amount of $15,000.00 per mile of its completed road, running 30 years, and bearing 6% per annum interest, and to secure the same by executing a second mortgage deed conveying the property and franchises of said company to the Central Trust Company of New York, but with the express proviso that it should constitute a second lien.

10th. That on the 30th day of April, 1886, the said company, purporting to be so reorganized, executed a paper-writing purporting to be lease of its franchise and property to a corporation created under the laws of the State of Virginia, under the corporate name of the Richmond and Danville Railroad Company, for a term of 99 years, and the said Richmond and Danville Railroad Company immediately after the execution of said lease took possession of its road-bed and property and operated the same as a carrier of freight and passengers until about the — of ——, 1892, when the said franchise and property of the said company were, by an order of the circuit court of the United States for the western district of North Carolina, placed in the hands of receivers.

11th. That subsequently, about the — day of ——, 1894, the said Western North Carolina Railroad Company so reorganized abdicated its duty to the State of North Carolina as a corporation *de facto* existing under its laws, by permitting another corporation, without authority of law, to take possession of its road-beds, property and franchise and attempt to discharge the duties to the State of North Carolina which it is obligatory upon the Western North Carolina Railroad Company to discharge, in accordance with the terms of the charter. And that the said company, created and organized under the laws of the State of Virginia, under the corporate name
255 of the Southern Railway Company, still has possession of the rolling stock and all other property of the said Western North Carolina Railroad Company, and is still operating said road, claiming to be the owner of its franchises and property, although the supreme court of North Carolina has adjudged and declared the deed, under which it claims the said franchise and property, null and void.

12th. That the said company operating the said road as a carrier of freight and passengers claimed under a deed purporting to have been made in pursuance of a decree of foreclosure of said second-mortgage bonds, but subject to the said first-mortgage bonds, which are still outstanding, and which now amount in the aggregate to about $1,500,000.

13th. That, as plaintiffs are advised, informed and believe, the said

Southern Railway Company claims to be the owner of the franchise and property of a number of other railroad companies created and organized under the laws of the State of North Carolina, including the Durham and Keysville Railroad Company, the North Western North Carolina Railroad Company, the Atlantic, Tennessee and Ohio Railroad Company, the Yadkin Railroad Company, the Oxford and Henderson Railroad Company, and other companies, and that it has issued mortgage bonds aggregating about the sum of $120,000,000.00 and purporting to be secured by mortgages upon the franchise and property of the said Western North Carolina Railroad Company and the other said companies so purchased, whereas in truth its pretended title to the franchise and property of the said North Western North Carolina Railroad Company, the said Atlantic, Tennessee and Ohio Company, and other companies, is, as plaintiffs are advised, informed and believe, null and void, for the same reasons and upon the same grounds under the adjudication of the supreme court of North Carolina, with reference to the pretended title to the Western North Carolina Railroad Company is founded.

14th. That plaintiffs are advised, informed and believe the said Southern Railway Company, by reason of the fact that the railroads claimed by it have not been purchased by authority of law, and that its pretended titles to the franchises and property of the same are null and void, is insolvent and unable to account to the Western North Carolina Railroad Company for a fair rental for the privilege of operating its road.

15th. That plaintiffs are advised, informed and believe the
256 said Western North Carolina Railroad Company has permitted the said Southern Railway Company to take possession of its rolling stock and other movable property and effects, and to mark it as the property of the said Southern Railway Company, and to com-ingle it with the other property of the said Southern Railway Company, so that it cannot be identified, so that it may be sold under execution, and the lawful purchaser may acquire possession thereof.

16th. That the plaintiffs are advised that the plaintiff, Pearson, and other holders of the original private stock of the Western North Carolina Railroad Company, not represented as aforesaid at any pretended reorganization of the company in the year 1880, are entitled to hold their said stock discharged of any lien created by either of said mortgage deeds executed to the Central Trust Company of New York (if any lien was created by either of said deeds), and are entitled to have a receiver appointed to collect a fair rental for the franchise and property of the said Western North Carolina Railroad Company from the persons or corporation now operating the said road, and to apply the same under direction of the court, and in accordance with the rights of the parties claiming the same.

17th. That the plaintiffs, Cleyme James, administratrix of W. A. James, has recovered judgment in the superior court of Rowan county against the defendant, The Western North Carolina Railroad Company, which bears date the 21st of February, 1898, for the sum of $15,000.00 and costs of action in an action brought for the negli-

gent killing of her intestate, Wm. A. James, and plaintiffs are advised, informed and believe, that the said judgment constitutes a lien upon the franchises and property of said company superior to the lien of either of said mortgages even though the said mortgages should be declared valid liens.

18th. That by reason of the fraudulent concealment of the property of the Western North Carolina Railroad Company by the said Southern Railway Company and comingling of the same with other property claimed by the said Southern Railway Company, plaintiff, Clemye James, administratrix, as aforesaid, is unable to distinguish the rolling stock and property of the said Western North Carolina Railroad Company, and in case of a sale of its franchises and property upon execution issued upon her said judgment, she is unable to identify or secure the property which would be subject to such execution.

19th. That the said pretended mortgage deeds and the said
257 pretended sale under said second mortgage, which has since been adjudicated and declared by the supreme court of North Carolinia to be null and void, have cast a cloud upon the title to the franchise and property of the said Western North Carolina Railroad Company, so that until the rights of the parties are adjudicated and determined the said franchise and property may not, if sold under execution issued upon the judgment rendered as aforesaid in favor of the plaintiff, James' administratrix, may not, as plaintiffs are advised, bring a sufficient sum to satisfy the judgment, and as plaintiffs are advised, in the event that by such sale the said judgment should not be satisfied, the said Clemye James would be entitled to demand the payment of any balance out of any funds due the Western North Carolina Railroad Company from any tenant, whether an artificial or natural person, who may have been permitted, with the consent of the Western North Carolina Railroad Company to operate its road as a carrier of freight and passengers.

20th. That the plaintiffs are advised and believe that the said Western North Carolina Railroad Company is insolvent, and that its directors have been guilty of mismanagement of its affairs for the fraudulent purpose of getting control and management of its franchise and property and preventing the creditors of the said company from collecting claims against it, and that it has ceased to transact the business for which it was incorporated, and that its financial embarrassments are such — to render it impracticable for it to resume the operation of its road, and plaintiffs, therefore, are advised, informed and believe that the property of the said Western North Carolina Railroad Company cannot be preserved for the benefit of its creditors and stockholders, unless the same be placed in the hands of a receiver, or receivers, to be appointed by this court.

Wherefore, plaintiffs pray that a permanent receiver be appointed to take charge of the franchise and property of the said Western North Carolina Railroad Company and to operate the same under the orders of the court.

2nd. That a referee be appointed to report to the court the nature and character of the indebtedness of the said Western North

Carolina Railroad Company, and that all creditors who will make themselves parties to this action may be authorized to prove their claim before such referee, and that all stockholders may prove before him the number and nature of their respective shares of stock,
and that the said referee be directed to report to the court
258 what claims, if any, constitute liens upon the franchise and property of the said company, and the order of priority of liens, if any exists.

3rd. For such other and further relief as to the court may seem just.

4th. For cost of action.

A. C. AVERY,
B. F. LONG,
LEE S. OVERMAN,
Attorneys for Plaintiffs.

Clemye James, administratrix of W. A. James, one of the plaintiffs above named, maketh oath that the facts set forth in the foregoing complaint as of her own knowledge are true, and though stated on information and belief she believes to be true.

—— ——.

Sworn to and subscribed before me this 5th day of March, 1898.

—— ——.

Endorsement: Filed June 16th, 1898. H. C. Cowles, clerk.

And now on this the 16th day of June, 1898, is filed the answer of S. T. Pearson, as follows, to wit:

Answer of S. T. Pearson.

In the Circuit Court of the United States, the Western District of North Carolina, at Statesville, N. C.

IN THE MATTER OF THE SUIT OF THE CENTRAL TRUST COMPANY of New York, Complainant,
vs.
THE WESTERN NORTH CAROLINA RAILROAD COMPANY ET ALS., Respondents.

S. T. Pearson, reserving to himself the right to except to the jurisdiction of the court and saving and reserving all exceptions to the imperfections of the bill of complaint, answering, says:

I. That he adopts and asks to be taken as his own the answer of his codefendant, Clemye James.

259 II. That further answering paragraph seven of the joint complaint, your respondent says, that: That as he is advised, informed and believes, the allegations contained therein are not true, except the allegation that respondent claims to own one share of stock.

Wherefore respondent prays to be hence dismissed with his reasonable costs.

S. T. Pearson maketh oath that the facts set forth in the foregoing answer as of his own knowledge, are true, and that those stated on information and belief, he believes them to be true.

S. T. PEARSON.

Sworn to and subscribed before me this 13th day of June, 1898.
[SEAL.] P. W. PATTON, *C. S. C.*

Endorsement: Filed June 16th, 1898. H. C. Cowles, clerk.

And on this 17th June, 1898, is filed the replication of the complainants to the answer of the respondents, as follows, to wit:

Replication of Complainants to Answer of Respondents.

United States Circuit Court, Western Dist. of *New* Carolina, Charlotte, N. C., June 18th, 1898.

CENTRAL TRUST COMPANY OF NEW YORK and SOUTHERN Railway Company, Complainants, *against* S. T. PEARSON, CLEMYE JAMES, &c., and Others, Respondents. } In Equity.

Replication.

The complainants, making replication to the answer of respondents, now come and say*s*:

1. That they reiterate and reaffirm the allegations contained in their supplemental bill.

2. That the allegations contained in the answers of the respective respondents herein filed are not true, wherein the allegations
260 of the said bill are denied, and are not true, wherein facts are set out, not contained in said bill, and alleged as a defence to the same.

3. That, denying the truth of the said matters and things set out in the said respective answers of the respondents, and reaffirming the allegations in the said bill, the complainants asks to make good their said allegations by proofs, to be taken as this honorable court may direct.

CHAS. PRICE, *Solicitor.*

Chas. Price, being sworn according to law, says:

That he is the solicitor of the complainants, and that the foregoing replication to the answers of respondents is true.

CHAS. PRICE.

Sworn to and subscribed before me this 17th of June, 1898.

H. C. COWLES, *Clerk.*

Endorsement: Filed 17th June, 1898, by leave of court. H. C. Cowles, clerk.

And now on this 7th day of July, 1898, an injunction, with certified copies for respondents, is issued as follows, to wit:

Injunction.

UNITED STATES OF AMERICA,
Western District of North Carolina.

United States Circuit Court, Fourth Circuit, at Charlotte, N. C.

The President of the United States to the marshal of said district, Greeting:

You are hereby commanded to make known to Mrs. Clemye James, administratrix of W. A. James and S. T. Pearson, and Mrs. Fannie E. Howard, administratrix of J. H. A. Howard, their agents and attorneys, that,

Whereas, the Central Trust Company of New York has filed its bill in our said court of equity for said district and circuit against them and each of them, their agents and attorneys, and it was thereupon ordered by the said circuit court of the United States that an injunction should be issued against the said S. T. Pearson and the said Clemye James, adm'x as aforesaid, enjoining them, or
261 any of them, from proceeding any further in the prosecution of the said action set out in the bill, depending in the superior court of Rowan county, wherein S. T. Pearson and Mrs. Clemye James, administratrix as aforesaid, are plaintiffs, and The Western North Carolina Railroad Company is defendant, either by themselves or by their agents or attorneys, until the further order of this court.

And that the said Mrs. Fannie E. Howard, adm'x as aforesaid, is enjoined from instituting any action or proceeding such as the plaintiffs, Pearson and James, have begun, either by herself or by her agents or attorneys, until the further order of this court, and that each and all of the aforesaid parties, their agents and attorneys, are hereby enjoined and restrained accordingly, and commanded to desist from any and all acts herein forbidden them to do, and are forbidden and enjoined from, in any manner, interfering with the property, — the Western North Carolina R. R., of the Southern Railway Co., or with the franchise purchased at the foreclosure sale and owned and possessed by the said Southern Railway Company.

Herein not fail, and make due return of this writ.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States at Charlotte, N. C., the 7th day of July, 1898, and in the 123rd year of the Independence of the United States.

[SEAL.] H. C. COWLES,
Clerk U. S. Circuit Court, Western District of North Carolina.

Marshal's Return.

Received July 7th, 1898. Executed by reading and delivering copy to Mrs. F. E. Howard at Salisbury, N. C., July 8, 1898; by reading & delivering copy to S. T. Pearson at Morganton, N. C., July 9, '98, and by reading & delivering copy to Mrs. Clemye James at Asheville, N. C., July 9, '98.

J. M. MILLIKAN,
U. S. Marshal,
By P. D. ATWELL,
Deputy Marshal.

Endorsement: Filed in this office Jul- 10, 1898. H. C. Cowles, clerk.

262 And on the eighth day of October, 1898, a decree is filed in said cause in the words and figures as follows, to wit:

Decree.

In the Circuit Court of the United States, Western District of North Carolina.

IN THE MATTER OF THE SUIT OF THE CENTRAL TRUST Company of New York, Complainant, *vs.* THE WESTERN NORTH CAROLINA RAILROAD COMPANY. } Decree.

This cause coming on to be heard upon the supplemental bill, answers, replications, former orders, decrees and other evidence in the cause, the court doth declare, that the Southern Railway Company, a corporation, having become a party to this suit, is, together with the complainant, The Central Trust Company of New York, entitled to the relief demanded in the bill.

The court doth further declare, that the said Southern Railway Company is the lawful owner of the Western North Carolina railroad, together with the franchises of the Western North Carolina Railroad Company, having become such owner by reason of the purchase of the same as set out in the supplemental bill filed in this cause.

And now, it is therefore ordered, adjudged and decreed that the respondents, S. T. Pearson, Mrs. Clemye James and Mrs. Fannie Howard, personal representatives as set out in the bill, and other parties who *made* have made themselves parties to the suit of Pearson and others in the State court, as set out in the bill be, and are forever, restrained and prohibited from proceeding any further in the prosecution of the action set out in the bill, pending in the State court, or from beginning or taking any action for a similar purpose.

It is further ordered and decreed, that the said parties, S. T. Pearson and others be, and are, restrained and perpetually enjoined from

in any manner interfering, directly or indirectly, with the possession and quiet enjoyment by the said Southern Railway Company, or the Western North Carolina railroad, — its property and franchise purchased and owned by the said Southern railway as set out in the bill.

And it is further ordered and decreed, that the respond-
263 ents pay the costs of this proceeding, the same to be taxed by the clerk of this court.

CHARLES H. SIMONTON,
Circuit Judge.

Endorsement: Filed in this office Oct. 8, 1898. H. C. Cowles, clerk.

And now, on this 19th September, 1898, is filed the following petition on appeal, to wit:

Petition on Appeal.

THE UNITED STATES OF AMERICA,
Western District of North Carolina.

In the Circuit Court, Fourth District, at Statesville, North Carolina.
In Equity.

CENTRAL TRUST COMPANY OF NEW YORK, Complainant,
versus
THE WESTERN NORTH CAROLINA RAILROAD COMPANY, S. T. Pearson, Mrs. Clemye James, Adm'x, *et al.*, Defendants.

Clemye James, administratrix of W. A. James, Fannie E. Howard, administratrix, and S. T. Pearson, defendants in the above-entitled cause, conceiving themselves ag-rieved by the decree made and entered in the above-entitled cause by Hon. Charles H. Simonton, judge of the circuit court in the 4th circuit, South Carolina, on the 5th day of July, 1898, do hereby appeal from said order and decree to the United States circuit court of appeals for the fourth circuit, for the reasons specified in the assignment of errors, which is filed herewith, and the said defendants pray that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the supreme court.

September 1st, 1898.

A. C. AVERY,
B. F. LONG, AND
LEE S. OVERMAN,
Attorneys for Defendants.

The foregoing claim of appeal is allowed.

CHARLES H. SIMONTON,
Circuit Judge.

10 day of Sep., 1898.

264 Endorsement: Filed in this office Sep. 19, 1898. H. C. Cowles, clerk.

And on this, the 19th September, 1898, the following assignment of errors is filed, to wit:

Assignment of Errors.

THE UNITED STATES OF AMERICA,
Western District of North Carolina.

In the Circuit Court, Fourth District, at Statesville, North Carolina.
In Equity.

CENTRAL TRUST COMPANY OF NEW YORK, Complainant,
versus
THE WESTERN NORTH CAROLINA RAILROAD COMPANY, S. T. Pearson, Mrs. Clemye James, Adm'x, *et al.*, Defendants.

Assignment of error-.

And now, on the 25th day of July, 1898, came Clemye James, administratrix of W. A. James, Fannie E. Howard, administratrix, and S. T. Pearson, by A. C. Avery, B. F. Long and Lee S. Overman, their solicitors, and say that the decree in the above-entitled cause, wherein they are defendants, is erroneous and against the just rights of the said defendants for the following reasons:

First. Because it appears upon the face of the record that the said circuit court of the United States had, at the time when the decree was made in the above-entitled cause, on the 5th day of July, 1898, by Hon. Charles H. Simonton, judge of the circuit court for the 4th circuit, neither rightful jurisdiction of the parties before the court, nor of the subject-matter of the controversy raised by the supplemental bill filed in said cause, and which the court attempted to determine by the said decree made on the said 5th day of July, 1898, for that the jurisdiction of said circuit court had ceased, final decree was entered in this cause, as appears from the face of the record confirming a sale theretofore made of the Western North Carolina railroad, its franchises and property (in so far as the court had authority) by virtue of a decree of foreclosure of the second mortgage thereon, and a deed had been made by the special master, in pursuance of
265 said decree, to the Southern Railway Company, and the Southern Railway Company had taken possession of the said road, and begun to operate it about the — day of ——, 1894, about four years before the action brought by the above-named defendant in the superior court of Rowan county, and which they are now restrained from prosecuting, was instituted.

Second. Because it appears from the original record in this cause wherein the decree of foreclosure of the second mortgage was made, together with the record of the supplemental proceedings therein, that the court had no jurisdiction under the clause of the Constitu-

tion of the United States authorizing its creation, nor under any part of the said Constitution, or any statute enacted in pursuance of it, was authorized by virtue of such decree as that made in this cause on the 5th day of July, 1898, to restrain the parties plaintiff, together with their attorneys, from further prosecuting the action brought in the superior court of Rowan county, a court of the State of North Carolina which had rightful jurisdiction of the parties and subject-matter of the action so brought in said superior court, and because the court was expressly prohibited by law from making such order enjoining the defendants.

Third. Because the said circuit court is a creature of the Constitution of the United States, and has no authority under the said Constitution, nor under any statute passed by Congress in pursuance of said Constitution, under a claim of right to indefinitely perpetuate its control over a domestic corporation of the State of North Carolina by keeping alive a suit in equity for the purpose of adjusting immaterial matters of account after the right to a decree of foreclosure to satisfy second-mortgage bonds had been determined, a sale under said decree made, and the property had passed into the custody and under control of the purchaser under said decree, as appears from the record.

Fourth. Because the Constitution of the United States does not empower Congress to vest authority in Federal courts to review and modify or overrule a decision of the highest appellate courts of the State of North Carolina, which has determined that the Western North Carolina Railroad Company is a domestic corporation still existing under the law of such State, and is subject to its visitation, and because of the claim of right to take cognizance and enter the decree appealed from, is an unauthorized stretch of judicial authority, as appellants contend, fraught with danger to the rights of that State and subversive of the fundamental principle embodied in the
266 national Declaration of Independence and perpetuated in the amendments to the Constitution of the United States, that the individual citizen cannot be compelled to vindicate his rights in courts remote from his residence, and at such costs as amounts to a denial of justice.

Fifth. Because the court erred in sustaining the right of a citizen of a State other than the State of North Carolina, by reason of said diverse citizenship, under the Constitution of the United States to restrain a court of said State having rightful jurisdiction from further proceeding in an action brought, as appears from the face of the record, to subject the equitable assets of the Western North Carolina Railroad Company to the discharge of a judgment or judgments entered in the superior court of Rowan county with the decision and mandate of the supreme court of North Carolina in the exercise of its rightful jurisdiction.

Sixth. Because the court was in error in holding that a supplemental bill would lie in this cause in order to enforce the decrees of sale and confirmation of sale theretofore entered in the cause.

Seventh. Because the court erred in holding that the said decree

confirming the sale of the Western North Carolina railroad was not a final decree.

Eighth. Because the court erred in holding that the so-called corporation which had control of the franchise and property, when the original bill was filed, fully represented each of the stockholders in the original covenant who had participated in its reorganization.

Ninth. That the court erred in failing, and refusing, to follow the rulings of the supreme court of the State of North Carolina construing the statutes of said State to mean that the Southern Railway Company, a corporation created by, and existing under, the laws of the State of Virginia, was not empowered to acquire the ownership by purchase under the said decrees of sale and confirmation of the franchise and appurtenant property of the Western North Carolina Railroad Company.

Tenth. Because the court was in error in misinterpreting and misconstruing the decision of the supreme court of North Carolina in the case of James *versus* The Railroad Company, to mean that the plaintiff in said suit did not have the right, as an incident to acquiring judgment against the Western North Carolina Railroad Company, not only to enforce said judgment at law, but by a pro-
267 ceeding equitable in its nature to show the right to sequester and to sequester such property of the said Western North Carolina Railroad Company as could not be subjected to sale under an ordinary execution issued from a court of law.

Eleventh. Because the court erred is misconstruing the said ruling of the supreme court of North Carolina and declaring it to be *obiter* in holding that the plaintiff in said action was entitled to recover a judgment against the Western North Carolina Railroad Company for the culpable negligence of the Southern Railway Company, operating the said Western North Carolina railroad under the claim of ownership acquired without express authority from the State of North Carolina to purchase the franchise and property of the Western North Carolina Railroad Company.

Twelfth. Because the court erred in disregarding and refusing to follow the ruling of the supreme court of North Carolina construing to mean that the Southern Railway Company was neither authorized by the statutes of North Carolina to purchase or hold the franchise of the Western North Carolina Railroad Company, nor the property necessarily used in the operation of said road.

Thirteenth. Because the court was in error in ruling, contrary to the said decision rendered by the supreme court of the State of North Carolina, that the Southern Railway Company became by virtue of its purchase and the said decree of confirmation the owner of all the property late of the Western North Carolina Railroad Company, subject only to the qualification that it had assumed to pay the first-mortgage debt to the Central Trust Company of New York.

Fourteenth. Because the court was in error in construing sections 671, 672, 673, 674, 675, 697, Code of North Carolina, as making no discrimination between natural persons and corporations as purchasers of corporate property, when the supreme court of the State of North Carolina had construed the very same statutes as conferring

no power upon a corporation created by and existing under the laws of another State to purchase or hold the franchise or property of a railroad company or other *quasi*-public corporation.

Fifteenth. Because the court erred in holding, contrary to the ruling of the said State court, that the defendants could not
268 raise the question whether the Southern Railway Company held the property of the Western North Carolina Railroad Company as absolute owner, or as the tenant of the latter company, even in the exercise of their right under the decision of the supreme court of the State of North Carolina to acquire and ensorce a judgment against the Western North Carolina Railroad Company, which it had the right to recover, only because the court held the company operating the road to occupy the relation of tenant to the true owner.

Sixteenth. Because, as appears from the record, the writ of injunction in this cause was granted by the court contrary to law, and, in this regard, against the express provisions of section 720 of the Revised Statutes of the United States.

Wherefore, the said appellants pray that the said decree be reversed, and that the said court may be directed to enter a decree in accordance with the prayer of the bill.

A. C. AVERY,
B. F. LONG AND
LEE S. OVERMAN,
Solicitors for Plaintiffs.

Endorsement: Filed in this office Sep. 19, 1898. H. C. Cowles, clerk.

And now on this 19th September, 1898, the following citation to appellees is filed, to wit:

Citation to Appellees.

THE UNITED STATES OF AMERICA:

Circuit Court, Western District of North Car., at Statesville, North Carolina.

To the Central Trust Company of New York and The Southern Railway Company, Greeting:

Whereas, Clemye James, administratrix of W. A. James, Fannie E. Howard, administratrix, and S. T. Pearson have lately appealed to the United States circuit court of appeals for the fourth circuit from a decree lately rendered in the circuit court of the United States for the western district of North Carolina, made in favor of you, the said Central Trust Company of New York, and the Southern Railway Company, and have filed the security required by law,
269 you are, therefore, hereby cited to appear before the said United States circuit court of appeals for the fourth district

at the city of Richmond, on the twenty-ninth day of September next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at Flat Rock, North Carolina, this the — day of September, in the year of our Lord one thousand eight hundred and ninety-eight.

CHARLES H. SIMONTON,
Judge of the Circuit Court of the United States for Western Dist. North Carolina.

Endorsement: I, hereby this 14th day of Sept. 1898, accept due personal service of this citation on behalf of Southern Railway and Central Trust Company of New York. Charles Price. Filed in this office Sep. 19, 1898. H. C. Cowles, clerk.

And now, on this 19th September, 1898, is filed the agreement of plaintiff's counsel to allowance of time to perfect appeal as follows, to wit:

Agreement of Plaintiff's Counsel to Allowance of Time to Perfect Appeal.

CENTRAL TRUST COMPANY OF NEW YORK
vs.
THE WESTERN NORTH CAROLINA RAILROAD CO., S. T. PEARSON, Mrs. Clemye James, Adm'r'x, *et al.*

It is hereby agreed that the solicitors for plaintiffs in the above-entitled cause shall have 30 days in which to perfect their case on appeal to the United States circuit court of appeals for the fourth *district* at the city of Richmond.

CHAS. PRICE,
Solicitor for Appellees.

This 2 day of Sept. 1898.

Endorsement: Filed in this office September 19, 1898. H. C. Cowles, clerk.

270 And on Sep. 23, 1898, the following letter from his honor, Charles H. Simonton, circuit judge, in regard to the extension of time to prepare record, is filed, and requested to be incorporated in the record, to wit:

Letter from His Honor Charles H. Simonton, Circuit Judge.

The Circuit Court of the United States, Fourth Circuit.

FLAT ROCK, N. C., 10*th Sept.*, 1898.

Lee S. Overman, Esq., Salisbury, No. Ca.

MY DEAR SIR: With this I return papers in Central Trust Co. *vs.* Western No. Ca. R. R. Co. *et al.*, and have amended your petition

by striking out "at chambers." The case was heard at Charlotte in open court, and it then stands as of that court.

I have also extended the citation to 29, instead of the 13 Sept., to give the clerk time to prepare record. He must have it in Richmond on or before that date; if he cannot do so, let me know, and I will extend the time—that is, let me know before the 29th.

Yours truly, CHARLES H. SIMONTON.

Endorsement: Filed in this office Sep. 23, 1898. H. C. Cowles, clerk.

And on September 26th, 1898, an order extending the time to prepare record on appeal in this case for fifteen days is received and filed in the words and figures as follows, to wit:

Order Extending Time Fifteen Days to Perfect Appeal.

In the Circuit Court of the United States for Western District of North Carolina, at Statesville, Fourth Circuit. In Equity.

CLEMYE JAMES, Administratrix, and Others, Appellants,
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK, Appellee. } Order.

271 In this case the appellants are granted fifteen days' time, counting from the 29th day of September, 1898, in which to perfect their appeal in this case, in case such time is needed by them.

CHARLES H. SIMONTON,
Circuit Judge of the Fourth Circuit.

24th of Sept., 1898.

Endorsement: Filed in this office Sept. 26, 1898. H. C. Cowles, clerk.

Order to Transmit Record.

And, thereupon, it is ordered by the court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States circuit court of appeals for the fourth circuit; and the same is transmitted accordingly.

Teste:

[SEAL.] H. C. COWLES, *Clerk.*

Clerk's Certificate.

UNITED STATES OF AMERICA, }
Western District of North Carolina. }

Circuit Court of the United States, Fourth Circuit, at Charlotte, N. C.

I, H. C. Cowles, clerk of the circuit court of the United States for the western district of North Carolina, at Charlotte, N. C., do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of The Central Trust Company of New York, complainants, against The Western North Carolina Railroad Company, Clemye James, administratrix of W. A. James and others, respondents, as fully as the same remains on file and of record in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said court at my office in Charlotte, in said district, on this the 8th day of October, A. D. 1898.

[Seal of the Court.]

H. C. COWLES,
Clerk of said Court.

272 *Agreement as to Printing Record.*

Filed Oct. 19, 1898.

United States Circuit Court of Appeals, Fourth Circuit, at Richmond, Virginia.

THE CENTRAL TRUST COMPANY OF NEW YORK, Appellee, *vs.* CLEMYE JAMES, Administratrix, and Others, Appellants.	Appeal from the Circuit Court of the United States for the Western District of North Carolina.

To Mr. Henry Meloney, clerk of the circuit court of appeals, Richmond, Va.:

The complainant and the respondent in the above-entitled cause hereby agree that you shall print the parts of the record in this cause hereinafter *mention-*, to be used in this cause, upon argument thereof, agreeably to rule 23 of this court as amended, that is to say:

Of the record of the original suit in the circuit court the following parts:

		Page of Record.
1.	The caption	1
2.	The original bill of complaint	1
3.	Exhibit A thereof, or the 2nd mortgage of date Sept. 2nd, 1884	15
4.	Answer of the W. N. C. R. R. and the R. & D. R. R. Co	37
5.	Amendment to the original bill	38
6.	Decree of foreclosure and sale	39
7.	Special master's report of sale and memorandum thereof	55
8.	Motion of purchaser to confirm special master's sale	65
9.	Decree confirming special master's sale	67
10.	First mortgage of Sept. 1st, 1884	

Of the supplementary proceedings the following:

11.	Supplementary bill of complaint and petition	76
12.	Exhibit A, which is the complaint of S. T. Pearson and Clemye James in superior court	88
13.	Exhibit B, deed of Chas. Price, special master, to Southern Railway Company	100
	14. Restraining order	111
273	15. Agreement of attorneys to hearing at June term, Charlotte	115
16.	Exceptions to supplemental bill	116
17.	Answer of Clemye James, administratrix	117
18.	Answer of Fannie E. Howard, administratrix	126
19.	Exhibit A	135
20.	Answer of S. T. Pearson	146
21.	Replication	147
22.	Injunction	165
23.	Final decree recently sent the clerk	
24.	Petition on appeal	168
25.	Allowance of same by judge	168
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28.	Acceptance of service of same	177
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30.	Letter of Judge Simonton—extension of time to prepare record	179
31.	Order of Judge Simonton extending time	182
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(The opinion of Judge Simonton is omitted from the printed record, because it will appear in the Federal Reporter.)

Witness our hands this the 17th day of October, 1898.

CHAS. PRICE,
Solicitor for the Complainants, Appellees.

A. C. AVERY,
LEE S. OVERMAN,
B. F. LONG,
Solicitors for the Respondents, Appellants.

274 *Opinion.*

Filed Nov. 9, 1899.

United States Circuit Court of Appeals Fourth Circuit.

MRS. CLEMYE JAMES, Administratrix of W. A. James, and Others. Appellants,
versus
THE CENTRAL TRUST COMPANY of New York and Southern Railway Company, Appellees.

No. 289. Appeal from the Circuit Court of the United States for the Western District of North Carolina.

(Argued February 16, 1899; decided November 9, 1899.)

Before Goff, circuit judge; Morris and Brawley, district judges.

A. C. Avery for the appellants (B. F. Long & Lee S. Overman, on the brief), Charles Price for the appellees.

Statement.

This is an appeal by the respondents below from a decree of the circuit court of the United States for the western district of North Carolina, granting an injunction against S. T. Pearson, Mrs. Clemye James, administratrix of W. A. James, and Mrs. Fannie E. Howard, administratrix of J. H. A. Howard, their agents and attorneys, enjoining the said S. T. Pearson and said Clemye James, administratrix, from proceeding any further in the prosecution of an action
275 set out in the bill of complaint depending in the superior court of Rowan county, wherein the said S. T. Pearson and said Mrs. James, administratrix, were plaintiffs, and The Western North Carolina Railroad Company, defendant, and enjoining Mrs. Fannie E. Howard from instituting any action or proceeding such as the plaintiffs, James and Pearson, had begun, and from beginning or taking any action for a similar purpose, and enjoining all said persons and their agents and attorneys from in any manner interfering with the property of the Western North Carolina Railroad Company, or the Southern Railway Company, or with the franchise purchased at the foreclosure sale, and owned and possessed by the said Southern Railway Company.

The facts necessary to an understanding of this appeal are as follows:

The Western North Carolina Railroad Company was originally chartered by North Carolina in 1854–'5, to build and operate a railroad within that State. In 1880, by an act of the legislature, the corporation was reorganized, and on September 1st, 1884, the company executed a first mortgage to the Central Trust Company of New York to secure bonds to the amount of $3,856,000, and on Sep-

tember 2d, 1884, executed a second mortgage to the same trust company to secure bonds to the amount of $4,110,000.

On April 30th, 1886, the company leased its road for ninety-nine years to the Richmond & Danville Railroad Company, a Virginia corporation, and the said lessee company took possession of the railroad property and operated it until 1892, when the Richmond & Danville Railroad Company having become insolvent, the property went into the hands of receivers appointed by the circuit court of the United States for the western district of North Carolina. On April 20th, 1894, the Central Trust Company of New York filed in the circuit court of the United States for the western district of North Carolina its bill to foreclose the second mortgage made to it by the Western North Carolina Railroad Company, and such proceedings were had that a decree of foreclosure of the second mortgage and sale was entered May 2, 1894. On August 21, 1894, the railroad property and franchises of the said Western North Carolina Railroad Company was sold under said decree, subject to the first mortgage, to the Southern Railway Company, a Virginia corporation.

276 On August 22, 1894, the sale was confirmed and the court accepted the Southern Railway Company as purchaser, and directed that possession of the property be delivered to it, and proper deeds of conveyance executed subject to the first mortgage and reserving to the court the right to retake and resell the property, if the Southern Railway Company should fail to discharge the debts, liens or claims which the court should decree to be paid out of the purchase-money in preference to the debt secured by the mortgage foreclosed. The Southern Railway Company thereupon was put in possession of the said railroad property and has ever since operated it as a part of its system of railroads.

In 1897, three years after the railroad was sold and conveyed to the Southern Railway Company, Mrs. James, administratrix of her husband, brought an action in the superior court of Rowan county, against the Western North Carolina Railroad Company, for the negligent killing of her husband who was engine-driver of a locomotive on the said road in the employment of the Southern Railway Company, and who was killed in 1896, about two years after the *the* foreclosure sale. In said court, a verdict was recovered for $15,000, and, on appeal to the supreme court of North Carolina, it was held (*James vs. Railroad Company*, 121 N. C., 523) that the Western North Carolina Railroad Company, as a corporation under the laws of North Carolina, was still in existence, and was still liable for damages caused by the mal-administration of the railroad by the Southern Railway Company, and that the railroad property itself, in the possession of the Southern Railway Company, could be held liable for such damages, and judgment was entered upon said verdict against the Western North Carolina Railroad Company. A judgment on a similar cause of action was also recovered in the same court by Mrs. Howard for the negligent killing of her husband who was a fireman in the employment of the Southern Railway Company.

The James judgment, having been directed to be entered by the supreme court of North Carolina, and that court having ruled that, notwithstanding the foreclosure sale, the property of the railroad was liable for the damages for which she had recovered judgment

Mrs. James, together with S. T. Pearson, instituted a proceed-
277 ing in the superior court of Rowan county, setting forth the recovery of the judgment against the Western North Carolina Railroad Company, and alleging, amongst other things, that the Western North Carolina Railroad Company was insolvent, and the Southern Railway Company, for reasons therein stated, was also insolvent, that the mortgages put upon the railroad property both by the Western North Carolina Railroad Company and by the Southern Railway Company were invalid, and praying that a permanent receiver be appointed to take possession of the franchise and property of the Western North Carolina Company and run the railroad under the orders of the court.

The scope of the bill of complaint filed in the superior court of Rowan county was very broad.

It was filed not only on behalf of Mrs. James, in an effort to subject the railroad property to the payment of her judgment, but was filed also on behalf of all stockholders of the Western North Carolina railroad, who claimed not to have assented to its reorganization, and all creditors of that company, and one of the complainants was S. T. Pearson, a holder of a share of the original capital stock of the company. The bill alleged that the reorganization in 1880 of the Western North Carolina Railroad Company was illegal and in disregard of the rights of certain stockholders, that the Western North Carolina Railroad Company had abdicated its duty as a corporation, and had, without authority of law, permitted the Southern Railway Company to take possession of its road-bed, property and franchise; that the pretended title of the Southern Railway Company to the franchise and property of the Western North Carolina Railroad Company was null and void; that the rolling stock and movables of the two railroad companies had been com-ingled so that the property of the Western North Carolina railroad could not be identified; that Pearson and certain stockholders of the Western North Carolina Railroad Company had not assented to the reorganization of the Western North Carolina railroad and were entitled to hold their stock discharged from any lien created by either of said mortgages to the Central Trust Company of New York (if any lien was created by either of said deeds) and were entitled to have a receiver appointed to collect a fair rental for the franchise and

property of the said Western North Carolina Railroad
278 Company from the corporation or persons now operating the road; and on behalf of creditors it was alleged that by reason of the fraudulent concealment of the property of the Western North Carolina Railroad Company by the Southern Railway Company the said judgment creditor was unable to distinguish the rolling stock of the Western North Carolina Railroad Company and subject it to execution; that the pretended sale under said second mortgage executed by the Western North Carolina Railroad Com-

pany to the Central Trust Company of New York had cast a cloud upon the title to the franchise and property of the Western North Carolina Railroad Company, and the bill prays for a permanent receiver to take charge of the franchise and property of the said Western North Carolina Railroad Company, and operate it under the orders of court; and that a referee be appointed, before whom all stockholders might prove the number and nature of their shares of stock, and all creditors might prove the value and character of the indebtedness of the Western North Carolina Railroad Company; and that the referee might report what claims constituted liens upon the property and franchise of the Western North Carolina Railroad Company.

Thereupon the Central Trust Company of New York and the Southern Railway Company of Virginia filed in the said foreclosure suit in the circuit court of the United States for the western district of North Carolina their supplementary petition and bill of complaint, setting forth the foregoing proceedings in the superior court of Rowan county, alleging that notice had been given requiring the Western North Carolina Railroad Company to show cause before said court why a receiver should not be appointed of said railroad property, and alleging that said proceeding was intended to take from the possession of the Southern Railway Company the property sold to it under the foreclosure decree, and to have that sale, and the conveyance thereunder, declared null and void.

The answer of the respondent, James, to this supplemental bill alleges, among other things, that the Southern Railway Company, being a Virginia corporation, had no power to acquire the title to the railroad and the franchise of the Western North Carolina Railroad Company, and that the Southern Railway Company acquired no title by its purchase. The answer of S. T. Pearson adopts
279 the answer of his corespondent, James, and the answer of Mrs. Howard is, in material matters, substantially the same.

The cause came on to be heard upon the pleadings and exhibits, and the circuit court of the United States for the western district of North Carolina entered its decree, awarding the injunction as prayed. (89 Fed. Rep., 24.) The respondents appealed, and the decree is before us upon their assignments of error.

MORRIS, *District Judge:*

In the bill of complaint in the superior court of Rowan county, filed by S. T. Pearson and Mrs. Clemye James, on behalf of themselves, and other creditors and stockholders of the Western North Carolina Railroad Company, praying for a permanent receiver, two classes of claimants are inextricably mingled. First, the stockholders of the Western North Carolina Railroad Company, and, second, the creditors who have become such since the second mortgage was foreclosed and the Southern Railway Company became the purchaser, and since the railroad property, by order of the United States circuit court, was delivered to it. However strenuously it might be urged that creditors whose causes of action came into existence two years after the foreclosure sale have a right to prosecute

their rights in any court that has jurisdiction, it seems clear to us that the stockholders of the Western North Carolina Railroad Company were parties to the foreclosure suit, and are bound by its decree, and that any proceeding on their part to reclaim the property sold under the decree must be made in the court in which the decree was entered. The contention of the stockholders is that the mortgage deed on which the decree was based was null and void as against them, and that by the decree and the sale thereunder their rights were not affected, and that they have a right to have a receiver appointed to retake the property from the purchaser. The bill of complaint does not so much as make the Southern Railway Company, the purchaser under the foreclosure decree having possession of the property, a party to the case, but ignores the foreclosure proceedings as of no effect as to these complaining stockholders.

280 So far as the stockholders are concerned, the correctness of the decree below depends upon two questions, first, are they bound and estopped by the foreclosure decree, and, second, is this a case in which the circuit court of the United States has jurisdiction, as against a party to the foreclosure suit, to make its decree effective by injunction, notwithstanding the prohibition of section 720 of the Revised Statutes, prohibiting the granting of an injunction by a court of the United States to stay proceedings in any court of a State.

It is settled that in a suit to foreclose a mortgage, executed by a corporation where there is no fraudulent collusion, the corporation represents all its stockholders, and that a decree against it binds them.

Railroad Co. vs. Howard, 7 Wall., 392–406.
Hawkins vs. Glenn, 131 U. S., 319–329.
Sanger vs. Upton, 91 U. S., 56–59.
Furnald vs. Glenn, 64 Fed. Rep., 49–53.

S. T. Pearson and the other stockholders are attempting to assert in the State court the very same right which was involved in the foreclosure suit against the Western North Carolina Railroad Company, and which was cut off and foreclosed by the decree and sale. The relief asked by the supplementary bill, filed by the purchaser in the United States circuit court, is to prevent the parties thus decreed against from retaking the railroad property in disregard of the court's decree. In *Dietzsh vs. Huidekoper*, 103 U. S., 494, 497, it is said "a court of the United States is not prevented from enforcing its own judgments by the statute which forbids it to grant a writ of injunction to stay proceedings in a State court," and in that case an injunction restraining the enforcement of a judgment of a State court in a replevin suit was sustained, because the effect of enforcing the judgment in the State court would be to defeat the judgment of the Federal court which had jurisdiction of the subject-matter.

In *Root vs. Woolworth*, 150 U. S., 401, 411, a decree had been entered in a circuit court of the United States in a suit to quiet title

in favor of one Morton establishing his right to certain land as against Root. Afterwards, notwithstanding this decree, Root, claiming by the same title as before, re-entered and took possession. Morton's title had been conveyed to Woolworth and he filed
281 his supplementary and ancillary bill asking that Root be enjoined from asserting any claim of title to the land and from interfering with Woolworth's sole and exclusive possession. This bill, although filed long after the original decree and by the assignee of the original complainant, was sustained as a proper exercise of the jurisdiction of courts of equity to make their decrees effective by injunction and writs of assistance. It seems quite clear to us that the injunction granted in the present case against S. T. Pearson was proper, and was within the jurisdiction of the circuit court as ancillary to the original decree of foreclosure and for the purpose of making that decree effective against persons who were bound by it.

Whether the circuit court had jurisdiction and could, notwithstanding section 720 of the Revised Statutes, enjoin Mrs. James and Mrs. Howard from proceeding with the suit entered by them, or any similar suit, or from in any manner interfering with the property of the Western North Carolina railroad, or the Southern railway, purchased at the foreclosure sale, is to our minds quite a different question.

The rule that a sale of real estate under judicial proceedings concludes no one who is not in some form a party to the proceedings (*Du Passuer vs. Rocheran*, 21 Wall. 130–135), has been applied by the Supreme Court of the United States, to a foreclosure sale of telegraph lines (*United Lines of Telegraph Co. vs. Boston, &c. Trust Co.*, 147 U. S., 431–448), and to a foreclosure sale of a railroad. (*Pittsburg &c. Railroad vs. Loan Trust Co.*, 172 U. S., 493–515.)

Neither Mrs. James nor Mrs. Howard could be said, we think, to have been in any sense a party to, or claiming under any party to the foreclosure suit or bound by it. Whatever rights they have accrued to them three years after the sale, and had no connection whatever with the rights which were adjudicated by the decree. It may be, notwithstanding anything adjudicated by that decree, that under the laws of North Carolina the Western North Carolina Railroad Company was answerable to them for the damages for which they obtained their judgments, and the railroad, now in possession of the Southern Railway Company, also liable. Those are questions not litigated in the foreclosure suit, and which the
282 appellees, in our judgment, could not by this supplementary and ancillary proceeding compel Mrs. James and Mrs. Howard to bring before the circuit court. *Sargant vs. Helton*, 115 U. S., 348; *Dial vs. Reynolds*, 96 U. S., 340; *Haines vs. Carpenter*, 91 U. S., 254.

The sale to the Southern Railway Company under the foreclosure decree is a defense which can be pleaded in the State court, and if the State court should fail to give that effect to the decree of the United States circuit court which the defendant is advised it should have, the law provides an appeal for the revision of that refusal by

the Supreme Court of the United States. *Du Passeur vs. Roeheran*, 21 Wall., 130–134; *Central Nat. Bank vs. Stevens*, 169 U. S., 432–456; *Central City Live Stock Co. vs. Butcher's Union*, 120 U. S., 141; *Pittsburg, &c. Railway vs. Loan and Trust Co.*, 172 U. S., 493–507.

In the bill which was filed by Pearson and Mrs. James in the superior court of Rowan county, on behalf of themselves and others, stockholders and creditors, the allegations on which relief is asked are largely based on the alleged invalidity of the mortgage foreclosed by reason of the supposed rights of Pearson and other stockholders, and it is charged that the pretended mortgage deeds and pretended foreclosure sale have cast a cloud upon the property sold, which makes it impossible for Mrs. James to realize her judgment claim. Thus it appears that the scheme of the bill is based, not upon the supposed right contended for in argument as the result of the opinion of the supreme court of North Carolina in James *vs.* Railroad Company, viz., that the old Western North Carolina Railroad Company continues to exist and to be answerable for damages incurred in the operation of the railroad, and the property in the hands of the Southern Railway Company liable for the judgment, but upon the allegation that by reason of the rights of certain stockholders, the mortgage foreclosed was invalid, and the foreclosure sale to be disregarded and treated as a nullity, and a receiver appointed in that collateral proceeding in another court to take the property from the purchaser. It is not a creditors' bill, based upon legal and equitable rights as creditor, but a stockholders' bill in which a creditor has joined, basing her claim to relief mainly upon the alleged invalidity of the mortgage foreclosed because of
283 the non-assent of certain stockholders. At least this supposed ground of relief is the gravamen of the whole bill. Without passing upon any other questions argued by counsel, and which we do not consider necessary to the decision of the case before us, we hold that the injunction, so far as it enjoins the further prosecution of the bill which was filed, should be continued, and the decree, as far as it grants that injunction, should be affirmed, but that the decree should be so modified as not to prohibit Mrs. James and Mrs. Howard from proceeding as they may be advised with any other suit not based upon the supposed rights of stockholders with respect to enforcing their judgment claims.

The cause is remanded with directions to modify the decree in accordance with this opinion.

284 *Decree.*

Filed Nov. 11, 1899.

United States Circuit Court of Appeals, Fourth Circuit.

MRS. CLEMYE JAMES, Adm'tx of W. A. James, ET AL., Appellants,
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK and Southern Railway Company, Appellees. } No. 289.

Appeal from the circuit court of the United States for the western district of North Carolina.

This cause came on to be heard on the transcript of record from the circuit court of the United States for the western district of North Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said circuit court, in this cause, be, and the same is hereby, affirmed, with costs, so far as it grants the injunction enjoining the further prosecution of the bill which was filed, but the said cause is remanded to the circuit court of the United States for the western district of North Carolina, at Charlotte, with directions to modify the said decree in accordance with the opinion of this court.

It is further ordered that the mandate of this court be issued after the expiration of 20 days from the date hereof.

November 11, 1899.

CHARLES H. SIMONTON,
Circuit Judge Presiding.

285 *Clerk's Certificate.*

UNITED STATES OF AMERICA, }
Western District of North Carolina. }

Circuit Court, 4th Circuit.

I, H. C. Cowles, clerk of the circuit court of the United States for the western district of North Carolina, at Charlotte and Statesville, in said district, do hereby certify that the papers herewith sent in equity case No. 38, The Central Trust Company of New York *et al.* against The Western North Carolina Railroad Company, D. R. Julian, *et al.*, to wit: 1, Complainants' prosecution bond; 2, equity subpœna and return; 3, injunction and return; 4, answer of D. R. Julian; 5, motion by attorneys for James, adm'x, and Howard, adm'x, to enter a special appearance and dismiss the proceedings for cause set forth in said motion; 6, special appearance of attorneys for respondents; 7, appearance of James, adm'x, and Howard, adm'x, pleading to the

jurisdiction; 8, answer James, adm'x, and Howard, adm'x, to bill in this cause; 9, replication of the complainants; 10, exhibits of complainants filed in the cause of certain suits against West. N. C. R. R. Co., viz: Giles *vs.* W. N. C. R. R. Co.; Perry *vs.* W. N. C. R. R. Co.; Brown, adm'r of Brown, *vs.* Southern Railway Company and City of Asheville; Sorrels, adm'r of Whitener, *vs.* Southern Railroad Company, and W. N. C. R. Co.; 11, decree of his honor Judge Boyd continuing injunction in this case; 12, petition on appeal by respondents, appellants; 13, citation on appeal; 14, agreement of counsel as to printing; 15, order extending time to file appeal bond; 16, assignment of errors; 17, opinion of his honor James E. Boyd; 18, appeal bond, are original papers in said cause as fully as the same were filed and of record in said cause, with original petition, consent and order to transmit the same.

Seal of the Court.

In testimony whereof I hereunto set my hand and affix the seal of said court at office in the city of Charlotte this the 11th day of January, A. D., 1902.

H. C. COWLES,
Clerk of said Court.

286 On another day, to wit, February 12, 1902 (February term, 1902) the said cause came on to be heard in the said United States circuit court of appeals for the fourth circuit, and is argued by counsel, and submitted.

And on another day, to wit, May 8, 1902 (May term, 1902) the said United States circuit court of appeals announced and filed its opinions, which is as follows, to wit:

Opinion.

Filed May 8, 1902.

United States Circuit Court of Appeals, Fourth Circuit.

DAVID R. JULIAN, Sheriff; Mrs. Clemye James, and Fannie E. Howard, Appellants, *versus* THE CENTRAL TRUST COMPANY OF New York and Southern Railway Company, Appellees.	No. 438. Appeal from the Circuit Court of the United States for the Western District of North Carolina, Statesville.

(Argued February 12, 1902; decided May 8, 1902.)

Before Goff and Simonton, circuit judges, and Keller, district judge.

A. C. Avery (B. F. Long & Lee S. Overman on the briefs) for appellants; Charles Price for the appellees.

SIMONTON, *Circuit Judge:*

This case comes up on appeal from the decree of the circuit court of the United States for the western district of North Carolina, granting an injunction.

The bill of complaint was filed by the Central Trust Company, a corporation of the State of New York, and the Southern Railway Company, a corporation of the State of Virginia. It was a supplemental bill or, more properly, a bill in the nature of a supplemental bill, to a bill theretofore filed in the same court by The Central Trust Company of New York, the same complainant, against The Western North Carolina Railroad Company, a corporation
287 of the State of North Carolina, *et al.*, to which proceedings the Southern Railway Company had been made a party, as purchaser under a decree made therein. The defendant to this bill was David R. Julian, sheriff of Rowan county, North Carolina, a citizen and resident of the State of North Carolina. He demurred to the bill and his demurrer, claiming that he acted solely in his official capacity, having been overruled, Mrs. Clemye James, administratrix, and Fannie E. Howard, administratrix, were also added as parties defendant. The facts disclosed by the pleadings are these:

W. A. James and John H. A. Howard, the one an engineer and the other a fireman, both in the service of the Southern Railway Company, and whilst in the actual employment of that company lost their lives on 17 November, 1896, on the railroad of that company, known as the Western North Carolina railroad. Thereupon separate actions were brought in the superior court of Rowan county, North Carolina, on the 30 January, 1897, by Mrs. Clemye James, who had administered upon the estate of W. A. James, and Mrs. Fannie E. Howard, who had administered on the estate of John H. A. Howard, against the Western North Carolina Railroad Company, a corporation of the State of North Carolina, wholly distinct from the Southern Railway Company, and which was not a party thereto, seeking damages. In these actions verdicts were rendered on 21 February, 1898, against the Western North Carolina Railroad Company, one in favor of Mrs. Clemye James, administratrix, in the sum of $15,000, and one in favor of Mrs. Fannie E. Howard, administratrix, in the sum of $5000. Judgments were entered on these verdicts and executions were issued and placed in the hands of D. R. Julian, who then was and is now sheriff of Rowan county, North Carolina. Each execution, after reciting the judgment, proceeds as follows: "You are therefore commanded, as often before, to satisfy the said judgment out of the personal property of the said defendant," The Western North Carolina Railroad Company, "within your county, or if sufficient personal property cannot be found, then out of the real property of the defendant and out of the corporate property, real and personal, of the said defendant, including its corporate franchises, corporate rights, privileges, powers, im-
288 munities and all its appurtenances belonging or in anywise connected with or appertaining to it as a body corporate, as owned and held by it on the day when the said judgment was so docketed in said county of Rowan, or at any time thereafter in whose hands soever the same may be." The execution states that the judgment was rendered on 21 February, 1898, and is dated itself 3

September, 1901. The sheriff proceeded under said execution, and advertised for sale the property levied on as follows:

"*Sale of the Western North Carolina Railroad under Execution.*

"By virtue of execution issuing from the superior court of Rowan county, North Carolina, one in favor of Clemye James, adm'r'x of W. A. James, for $15,000, interest and costs, and the other in favor of Fannie E. Howard, adm'r'x of John H. A. Howard, for $5,000, interest and costs, upon judgments duly docketed in the superior court of said county of Rowan, reference hereby being had to the said judgments for a fuller description thereof and by virtue of the levy made thereunder, the undersigned, as sheriff of Rowan county, State of North Carolina, will sell agreeably to the laws of the State in this behalf provided, at public auction to the highest bidder, at the court-house door in Salisbury on Monday the 7th day of October, A. D., 1901, at the hour of 12 m., all and singular the corporate property of the defendant, The Western North Carolina Railroad, existing in the State of North Carolina, including its corporate franchises, rights, privileges, immunities, easements and appurtenances of every kind appertaining, belonging to, or in anywise connected therewith or issuing out of and relating to the said The Western North Carolina railroad, together with all of its property in the State of North Carolina and including its road-bed and right of way, its real estate acquired and owned for railroad purposes, its stations, depots, grounds, its railway tracks, switches, sidings, bridges, fences, turn-tables, water tanks, viaducts, culverts, superstructures, passenger, freight and other houses, machine shops, buildings and fixtures, the said railroad extending from the town of Salisbury, through Statesville, Newton, Hickory, Morganton, Marion, Asheville, to Paint Rock, in Madison county, and from Asheville westward by way of Waynesville to Murphy, in Cherokee county—reference being had
289 for a further description of said road and its property, rights and franchises to the charter of the said road and the amendments thereto enacted from time to time by the General Assembly of North Carolina."

Under section 674 of the Code of North Carolina, it is provided that "the officer making such a sale shall, by deed, convey to the purchaser all the immunities and privileges which by law belong to the corporation, so far as relates to the right of demanding fare and toll, and the officer shall, immediately after such sale, deliver to the purchaser possession of all the corporate real property connected with the franchise belonging to such corporation in whatever county the same may be situated, and the purchaser may thereupon demand and receive for his own use all the fare and toll which may accrue within the time limited by the terms of purchase in the same manner and under the same regulations as such corporation was before authorized to demand and receive."

It was stated at the bar that the executions for the recovery of

$20,000 in the aggregate were levied on property valued at $5,000,000.

The purpose and prayer of the bill of complaint were for an injunction against this action on the part of David R. Julian, the sheriff.

SIMONTON, circuit judge, after stating these facts:

The first question is: Was the property so levied upon and advertised for sale corporate property of the Western North Carolina Railroad Company, as owned and held by it on the day when said judgment was so docketed in said county of Rowan, or at any time thereafter in whose hands soever the same may be?

The Western North Carolina Raiload Company was created a corporation of that State by its legislature. The sovereign power made of the corporators a single entity, and conferred upon them the franchises of acting as a person. This new person, creature of the law, and existing through the grace of and at the will of the sovereign, was then clothed with certain powers and granted certain privileges. These are called franchises. They were, first, to construct a railroad from Salisbury to Asheville, &c. Second, to this end, it was empowered to acquire and hold lands for railroad
290 purposes, by purchase, gift, or by condemnation proceedings in the exercise of eminent domain. Third, over the road so constructed it was endowed with the franchise of acting as a common carrier of persons and property and to demand and receive toll and fare therefor. The franchise to be a corporation is its life. It is inseparable from it. When it surrenders it or is deprived of it, it parts with its existence. But with regard to the other franchises mentioned, these are not inseparable from its existence. They constitute its property. They are distinct from the franchise to be a corporation. They may be mortgaged without it, and may pass to a purchaser by sale, may be levied upon and sold under execution. (*Memphis R. R. Co. vs. Commissioners*, 112 U. S., 610.) Under the laws of North Carolina a corporation can sell and transfer its franchises. (Code of North Corolina, secs. 671, 673, 675.) And the franchise so far as it relates to the receiving of fare or tolls, may be sold under execution, with or without the other property of the corporation. (Code of North Carolina, secs. 671, 672.)

Pursuing the power conferred upon it by its charter, the Western North Carolina railroad executed a mortgage of its property and franchises to the Central Trust Company of New York, on 1st day of September, 1884, to secure an amount of bonds not exceeding $12,500 for each mile of said road. This mortgage having been executed, the legal title, under the operation of law in North Carolina, passed to the Central Trust Company of New York, leaving in the North Carolina Railroad Company the equity of redemption only. *Hemphill vs. Ross*, 66 No. Ca., 477; *Ellis vs. Hussey, idem*, 501; *Isler vs. Koonce*, 81 No. Ca., 378; *Williams vs. Zeachey*, 85 No. Ca., 402, 405; *Parker vs. Beasley*, 116 No. Ca., 1. The mortgagee, being the legal owner of the land mortgaged, is the person to whom notice must be given by the sheriff of a levy and sale of such land

for unpaid taxes. *Whitehurst vs. Gaskill*, 69 No. Ca., 449, cited and approved in *Ex parte McCrary*, 84 No. Ca., 63; *Hill vs. Nicholson*, 92 No. Ca.. 24.

On the 2nd day of September, 1884, the Western North Carolina Railroad Company executed to the same Central Trust Company of New York its second mortgage, being the mortgage of this
291 equity of redemption, to secure two bonds, one in the sum of $3,090,000, and the other in the sum of $1,020,000. Default having been made on the bonds secured by this second mortgage, The Central Trust Company of New York, the mortgagee, filed its bill of foreclosure of this second mortgage in the circuit court of the United States for the western district of North Carolina, on 20th April, 1894, to which bill the Western North Carolina Railroad Company and its lessee, were made parties defendant. Answers were duly filed and, the cause being at issue, proceedings were had thereunder, whereby a decree for the foreclosure of said mortgage was made and an order for the sale of the interests mentioned in said mortgage, and that by said sale all right and equity of redemption in the North Carolina Railroad Company, and all persons claiming by, through or under it would be forever barred and foreclosed.

It goes without saying that the right to execute a mortgage carried with it the right of the mortgagee to obtain foreclosure of such mortgage. *New Orleans &c. R. R. Co. vs. Delaware*, 114 U. S., 501. After due advertisement this sale was had under the order of that court. The Southern Railway Company became the purchaser. Upon report of sale it was confirmed on 22nd August, 1894. The order of confirmation is in these words, after reciting that the special master execute his conveyance to the purchaser, "upon the delivery of said conveyance by the special master, the Southern Railway Company shall fully possess and be invested with all of the estate, right, title and interest in, to and of such railroad, equipment, property and franchises so sold under the decree of this court as the absolute owner thereof, to have and to hold the same to it and its successors and assigns forever." This conveyance was duly executed and recorded. The purchaser was put into possession. To all these proceedings the Central Trust Company, holder of the first mortgage, was a party, moving for and assenting to all the decrees therein, recognizing the Southern Railway Company as the owner of the equity of redemption and as the party liable for the payment of the bonds first issued under the first mortgage. It thus appears that the North Carolina Railroad Company, originally the owner of this property, with authority to a lien, sell or mortgage the same, then the mortgagor, then the owner of the equity of redemption, its
292 only means of procuring release of the mortgage, then the mortgagor of this equity of redemption, by a decree of a court of competent jurisdiction, in a suit to which it was a party, appearing and answering, was forever debarred and foreclosed of all right, title, interest and estate at law therein, and of all right and equity therein, including this equity of redemption. This being so, it did not have, on 21 February, 1898, (the day on which the judgment

upon which the execution complained of in this case was rendered) any interest, right, estate or property in the road levied upon or in its equipment, rolling stock, franchises or property of any description. All of these had become and were vested in the Southern Railway Company, the purchaser, under the decree of the circuit court of the United States for the western district of North Carolina. The sheriff, under his precept, had no right to levy upon and advertise the same for sale.

A purchaser at a sale under execution takes only the right of the debtor at the time the judgment was entered. A judgment at law does not overreach a prior equity of a third person acquired *bona fide* for valuable consideration (*Georgetown vs. Smith*, 4 Cranch, C. C. 91, Fed. Cases No. 5347).

The Supreme Court of the United States, in *Simmons vs. Burlington &c. Railway*, 159 U. S., 288, 289, quoted with approval *Lansing vs. Gælet*, 9 Cowan, 346, to the effect that a judicial sale of the estate under the decree of the court, if the court has the power to make a decree, whether it be in the form of a decree of sale preceded by a formal decree of foreclosure or in the form of a decree of sale without a formal decree of foreclosure, effectually bars the right of the mortgagor to redeem, and the purchaser will hold it under the title he acquires to it by virtue of the sale and conveyance he receives from the master, free and discharged from the equity of redemption. They also quote with approval 3 Pomeroy's Eq. Jur., sec. 1228, as follows: "The sale under a valid decree, immediately cuts off, bars and forecloses the rights of the mortgagor and of all subsequent grantees, owners, encumbrance-s and other persons interested, who were made parties defendant, and of all grantees, owners and encumbrance-s subsequent to the filing of a notice of *lis pendens*, although not made defendants. The case of *Jeffrey vs. Moran*, 101 U. S.,
293 286, resembles very much the case at bar. A railroad company of Ohio was sold under foreclosure proceedings 3 June, 1863, and was purchased by Moran. It was reorganized on 11 March, 1864, and on 12 March, 1864, Moran conveyed the whole railroad property to the new company, taking bonds and a mortgage for the purchase-money. The bonds not having been paid, Moran filed his bill for foreclosure 30 April, 1869. On 6 October, 1869, sale was ordered, Moran purchased at the sale, and it was confirmed on 2 December, 1869. On 22 June, 1866, one Zentmeyer was killed on the railroad. His administrator sued the road and got judgment 28 February, 1871, a year and seven months after the sale of the road. The administrator intervened and claimed part of the proceeds of sale. The mortgage to Moran had been executed subject to an act of 11 April, 1861, as follows:

"The lien of mortgages and deeds of trust authorized by this act, shall be subject to the lien of judgments recovered against said corporation after its reorganization, for labor thereafter performed for it or for materials or supplies thereafter furnished to it, or for damages for losses or injuries thereafter suffered or sustained by misconduct of its agents or in any action founded on its contracts or liabilities as a common carrier, thereafter made or incurred."

On this state of facts the court says: "When this judgment was rendered, there was no real estate of any kind in Clinton county, belonging to the railroad company. The road with all its appurtenances had been sold to Moran, under a decree upon the mortgage and sale confirmed more than a year before that time. Thereafter the relation of the property to the company was in all respects as if the company had never owned it. A lien by judgment therefore was impossible.

The act of the sheriff in levying on this property clearly was illegal. And inasmuch as under the law of North Carolina it would have been his duty to have put the purchaser into immediate possession and into the enjoyment and use of all the franchises of the company, and so work irreparable injury to the Southern railway, the owner in possession, the court having right and authority to do so, was bound to issue its writ of injunction (*Marshall vs. Holmes*, 141 U. S., 596; *Barrow vs. Hinton*, 99 U. S., 80).

294 It was insisted upon in argument that the Southern Railway Company, being a corporation of the State of Virginia, cannot hold railroad property in North Carolina. This question cannot arise in this discussion. Whatever may be the law in this regard, the title of the Southern railway cannot be disputed by the Western North Carolina Railroad Company or any person claiming by, through or under it. The decree of the circuit court of the United States for the western district of North Carolina, confirming the sale in a cause to which the Western North Carolina Railroad Company was a party, estops it. The purchase-money was paid and was applied to the debts of this railroad. It would be monstrous to affirm that, in despite of this, the railroad property and its franchises still remained in the Western North Carolina Railroad Company, subject to its debts, to its obligations incurred after the sale. If the Southern Railway Company holds this property contrary to the will of the sovereign power of the State, it is for the State to interfere. No private individual can usurp its prerogative. (*Nat. Bank vs. Matthews*, 98 U. S., 628; *Leazure vs. Hilleyas*, 7 Sergt. & Rawle, 313.)

The only remaining question is, can the circuit court of the United States interfere with this State officer, or is it precluded by the provisions of section 720 of the Revised Stat-es of the United States?

It will be observed that no question is made upon the validity of the judgments of James, administratrix, and of Howard, administratrix, in the State court. We do not sit to review these judgments, nor have we the right to do so. The case-made shows that Julian, the sheriff, is attempting to sell for the satisfaction of judgments against the Western North Carolina Railroad Company property in which that company has no interest or estate whatsoever. He has been enjoined, not from or because of the use of process, but because of the abuse of process. When he seeks to subject the property of the Southern Railway Company, by levying upon it under a judgment to which it was not a party, for the payment of the judgment

against the Western North Carolina Railroad Company, he goes outside of his official duty, and becomes a bald trespasser.

The supreme court of North Carolina has held in a current of cases, such as *Logan vs. R. R. Co.*, 116 No. Car., 940, that the
295 lessor of a railroad cannot divest himself of the public duties cast upon him by his charter by transferring them to another, without the express sanction of the State. That so a lessor is liable for any injury or trespass committed by his lessee, and his property may be levied upon for damages. This must proceed upon the idea that the property is still the property of the lessor and so liable for his obligations. But it cannot be held that the property of the lessee can be levied upon and sold under a judgment against the lessor, to which the lessee was not a party. Such a proceeding would be abhorrent to all law.

It is said also that under the statute law of North Carolina judgments for torts committed by a mortgagor take precedence of the lien of any mortgage executed by the mortgagor upon his property. Code § 1255. This doubtless is so as to any property held by the mortgagor at the time the tort was committed. But can it be said that the commission of a tort and judgment had thereon shall have such retroactive operation as to spring and create a lien upon property which, by operation of law, had passed out of the possession, ownership and control of the mortgagee long before the tort was committed? Surely not. (*Jeffrey vs. Moran*, 101 U. S., 286, quoted *supra.*) Under authority of the legislature, the Western North Carolina Railroad Company mortgaged its property and franchises to the Central Trust Company of New York. These mortgages included the whole estate of the mortgagor, the fee under the first mortgage subject to the equity of redemption, and the equity of redemption itself under the second mortgage. Until this equity of redemption was exercised the fee remained in the first mortgagor. This equity of redemption was foreclosed and the Western North Carolina Railroad Company lost it, was forever debarred from setting it up and exercising it. All of these proceedings were legal, sanctioned by the action of the legislature. The Southern Railway Company purchased this equity of redemption and the franchises sold and thenceforward, going into possession, claimed to be the owner thereof. Its rights were derived from proceedings inaugurated by creditors, establishing their rights under the mortgage, making these defeasible rights absolute. It does not claim under but against the Western North Carolina Railroad Company. It conducts its road in no sense as the agent of this railroad company. There is no privity between it and this railroad company which can make its property liable for the obligations of or subject to levy under a judgment against the North Carolina Railroad Company.

The decree of the circuit court is *affirmed.*

296 And thereafter, at the same term, on another day, to wit, May 10, 1902, the said circuit court of appeals made and entered the following decree, to wit:

Decree.

Filed May 10, 1902.

United States Circuit Court of Appeals, Fourth Circuit.

CLEMYE JAMES, Administratrix; D. R. JULIAN, Sheriff, *et al.*, Appellants,
vs.
SOUTHERN RAILWAY COMPANY and CENTRAL TRUST CO. of New York, Appellees.
No. 438.

Appeal from the circuit court of the United States for the western district of North Carolina.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the western district of North Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said circuit court in this cause be, and the same is hereby, affirmed, with costs.

May 10, 1902.

CHARLES H. SIMONTON,
Circuit Judge.

And afterwards, at the same term, on another day, to wit: May 13, 1902, the attorneys for the appellants presented an order to stay the mandate, and the court made and entered an order thereon, which petition and order is in the following words, to wit:

297 *Petition and Order Staying Mandate.*

Filed May 13, 1902.

United States Circuit Court of Appeals, Fourth Circuit.

DAVID R. JULIAN, Sheriff; MRS. CLEMYE JAMES, and MRS. Fannie E. Howard, Appellants,
vs.
THE CENTRAL TRUST COMPANY and THE SOUTHERN Railway Company, Appellees.
No. 438.

To the honorable circuit court of appeals:

The appellants, in the above-entitled cause, respectfully represent, that it is their purpose to file a petition for a writ of certiorari in the Supreme Court of the United States, within ten days from the date of this petition, and pray, that the circuit court of appeals will order, that the issuing of a mandate in said cause be stayed till the further order of the court.

A. C. AVERY,
LEE S. OVERMAN,
B. F. LONG,
Counsel for the Appellants.

Endorsed: "Let the mandate be stayed until the adjournment of this term of the supreme court. Charles H. Simonton, circuit judge, presiding."

13 May, 1902.

298 *Clerk's Certificate.*

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein-entitled cause as the same remains upon the records and files of the said circuit court of appeals.

Seal United States Circuit Court of Appeals, Fourth Circuit.

In testimony where- I hereunto set my hand and affix the seal of the said United States circuit court of appeals for the fourth circuit, this tenth day of December, A. D. 1902.

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, 4th C't.

299 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fourth circuit, Greeting:

Being informed that there is now pending before you a suit in which *David R. Julian, sheriff of Rowan county, Clemmye James,* administratrix of W. A. James, and Fannie E. Howard, administratrix of John H. A. Howard, are appellants, and The Southern Railway Company and The Central Trust Company, are appellees, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the western district of North Carolina, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United
300 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 14th day of March, in the year of our Lord one thousand nine hundred and three.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

301 [Endorsed:] File No. 18,685. Supreme Court of the United States. No. 457, October term, 1902. David R. Julian, sheriff, *et al., vs.* The Central Trust Co. & Southern Railway Co. Writ of certiorari. The execution of the within writ appears by certain schedules hereto annexed. Henry T. Meloney, cl'k U. S. circuit court of appeals, 4" circuit.

302 UNITED STATES OF AMERICA, *ss:*

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do make return of the annexed writ of certiorari issued out of the Supreme Court of the United States in the cause therein entitled on the 14th day of March 1903, by annexing hereto a certified copy of the stipulation of the attorneys of record that the certified transcript of the record now on file in the Supreme Court of the United States of said cause, and which has heretofore been printed, shall be taken and considered together with this agreement a proper return to said writ of certiorari.

In testimony whereof I hereto set my hand and affix the seal of the said circuit court of appeals, at Richmond on this 24th day of April, A. D. 1903.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, 4th Circuit.

303 UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fourth Circuit.

DAVID R. JULIAN, Sheriff; MRS. CLEMMYE JAMES, Administratrix of W. A. James, and Mrs. Fanney E. Howard, Administratrix of John A. Howard, Petitioners,

vs.

THE CENTRAL TRUST COMPANY OF NEW YORK and THE Southern Railway Company.

We, A. C. Avery, solicitor for the appellants, and Charles Price, solicitor for the appellees in the above entitled cause do hereby stipulate and agree that the certified transcript of the record now on file in the Supreme Court of the United States of said cause, and which was heretofore been printed shall be taken and considered together with this agreement, a proper return to the writ of certiorari issued by the Supreme Court of the United States on the 14th day of March, A. D. 1903, in said cause which in said court is numbered 457, directed to the circuit court of appeals of the fourth circuit and commanding said court to send without delay to said Supreme Court the record and proceedings in said cause.

A. C. AVERY,
LEE S. OVERMAN,
Counsel for Appellants.
CHAS. PRICE,
Counsel for Appellees.

304 UNITED STATES OF AMERICA, *ss:*

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do certify that the aforegoing stipulation of counsel is a true copy of the original filed April 24, 1903, and now remaining among the records and proceedings in the therein entitled cause.

In testimony whereof I hereto set my hand and affix the seal of the said circuit court of appeals, at Richmond, on this 24th day of April, A. D. 1903.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk United States Circuit Court of Appeals, Fourth Circuit.

305 [Endorsed:] File No. 18,685. Supreme Court U. S. October term, 1903. Term No. 139. David R. Julian *et al.*, petitioners, *vs.* The Central Trust Company *et al.* Writ of certiorari and return. Filed April 25", 1903.

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 457. 139.

DAVID R. JULIAN, SHERIFF; MRS. CLEMYE JAMES, ADMINISTRATRIX OF W. A. JAMES, AND MRS. FANNIE E. HOWARD, ADMINISTRATRIX OF JOHN H. A. HOWARD, PETITIONERS,

vs.

THE CENTRAL TRUST COMPANY AND THE SOUTHERN RAILWAY COMPANY.

Petition for Writ of Certiorari Requiring the United States Circuit Court of Appeals for the Fourth Circuit to Certify to the Supreme Court, for Its Review and Determination, the Cause of David R. Julian, Sheriff; Mrs. Clemye James, Administratrix of W. A. James, and Mrs. Fannie E. Howard, Administratrix of John H. A. Howard, Appellants, vs. The Central Trust Company and The Southern Railway Company, Appellees.

B. F. LONG,
LEE S. OVERMAN, AND
A. C. AVERY,
Attorneys and Counsel for Petitioners.

(18,685.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1908

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 457.

DAVID R. JULIAN, SHERIFF; MRS. CLEMYE JAMES, ADMINISTRATRIX OF W. A. JAMES, AND MRS. FANNIE E. HOWARD, ADMINISTRATRIX OF JOHN H. A. HOWARD, PETITIONERS,

vs.

THE CENTRAL TRUST COMPANY AND THE SOUTHERN RAILWAY COMPANY.

Petition for Writ of Certiorari Requiring the Circuit Court of Appeals for the Fourth Circuit to Certify to the Supreme Court, for Its Review and Determination, the Cause of David R. Julian, Sheriff; Mrs. Clemye James, Administratrix of W. A. James, and Mrs. Fannie E. Howard, Administratrix of John H. A. Howard, vs. The Central Trust Company and The Southern Railway Company.

To the Honorable Supreme Court of the United States:

The petition of David R. Julian, sheriff of Rowan county; Mrs. Clemye James, administratrix of W. A. James, and

Mrs. Fannie E. Howard, administratrix of John H. A. Howard, respectfully shows:

First. That your petitioners were the appellants and The Southern Railway Company and The Central Trust Company of New York were appellees in a cause lately pending in the circuit court of appeals for the fourth circuit, wherein an opinion was filed in said court sitting at Charleston, South Carolina, on the 7th day of May, A. D. 1902, and a decree affirming the judgment of the circuit court for the western district of North Carolina was entered in accordance with said opinion. A certified copy of the record of said cause, which was numbered 438 in said circuit court of appeals, will be hereto attached.

Second. That the decree of the said circuit court, which was affirmed, as aforesaid, by the said circuit court of appeals, enjoined and restrained the petitioner David R. Julian, sheriff of Rowan county, in the State of North Carolina, from selling under executions issuing from the superior court of said county of Rowan, in pursuance of the law of said State, upon two judgments theretofore rendered in said court respectively in favor of the petitioners Clemye James, administratrix of W. A. James, and Fannie E. Howard, administratrix of John H. A. Howard, and against the Western North Carolina Railroad Company, the franchise and property of said company, which said sheriff had levied upon by virtue of said executions, in pursuance of the laws of the State of North Carolina, as will hereinafter more fully appear, and had duly advertised for sale to satisfy said executions.

Third. That the petitioner Clemye James, administratrix of W. A. James, brought an action against the Western North Carolina Railroad Company, in the said superior court of Rowan county, for damages for the negligent killing of her said intestate, at the May term of said court, A. D. 1897, and upon the trial of said action in said court the jury found all issues in favor of said company except the issue of law whether, under the admitted facts, the Western North Carolina Railroad Company was answerable for the negligence of the Southern Railway Company in operating its road, and this issue was withdrawn from the jury and decided adversely to the plaintiff by the court; but upon appeal the supreme court of North Carolina reversed the said ruling of said superior court, and ordered that judgment be entered in the said court below against the Western North Carolina Railroad Company for the amount of damages assessed by the said jury for the killing of the said intestate, W. A. James, by the negligence of the Southern Railway Company.

James *vs.* Railroad, 121 N. C., 523.

Fourth. That, in the said action brought against the Western North Carolina Railroad Company, A. B. Andrews, first vice-president of the Southern Railway Company, answered in the capacity of president of the Western North Carolina Railroad Company, and was represented at the trials and hearings in said supreme court by the counsel employed to represent said Southern Railway Company in said State.

Fifth. That the said supreme court of North Carolina, in its opinion in the said appeal entitled Clemye James, administratrix of W. A. James, *vs.* The Western North Carolina Railroad Company, 121 N. C., 523, held:

1st. That the sale of the franchise and property of the Western North Carolina Railroad Company, created and organized under the laws of the State of North Carolina under a decree of foreclosure of a second mortgage, but subject to the lien of an outstanding first mortgage, did not release that company from liability to the public for the manner in which its road was operated by the Southern Railway Company, a corporation created and organized under the laws of the State of Virginia, claiming as purchaser under said decree.

2d. That section 1255 of the Code of North Carolina (enacted as chapter 101, Laws of 1879, and re-enacted as a part of the Code of North Carolina March 2, 1883) provided that "mortgages of incorporate companies should not exempt the property or the earnings of such incorporation from execution for the satisfaction of any judgment obtained in the courts of the State * * * for torts committed by such incorporation, its agents or its employees, whereby any person is killed or any person or property is injured, any clause or clauses in such mortgage to the contrary notwithstanding," and that the first and second mortgages were both executed in the year 1884, the one on the 1st and the other on the 2d of September, and were executed in contemplation of the said provision of section 1255, and that so long as the first mortgage should constitute a subsisting lien the

corporate existence of the company would not be extinguished and the lien of the first mortgage would be subject, under the provisions of the act of 1879, which were written into it as a contract, to be subordinated to the satisfaction of a judgment rendered for a tort.

3d. That the supreme court of North Carolina had held in Gooch *vs.* McGee, 83 N. C., 59 (decided at June term, 1880), more than four years before the mortgages were executed, that under sections 671, 672, 673, 674, 675 of the Code providing for regulating sales of such corporation the property of a corporation authorized to receive fare and tolls could not be sold, under execution or judicial decree, separate from its franchise.

4th. That the Code of North Carolina had provided in sections 697 and 698 of the Code, "considered in connection with section 701, which passed 1879, and sections 1936, 2005, referred to in section 701," that where the franchise and property of such corporations should be sold they should be reorganized as domestic corporations in accordance with the terms of said sections, and that if the franchise and property had passed unincumbered by said sale, no steps had been taken for a proper reorganization as a new corporation under the laws of North Carolina.

5th. That the said statutes of North Carolina (the Code sections 697, 698, 701, 1936, and 2005) could not be construed as creating a foreign corporation, such as the Southern Railway Company of Virginia, nor was there any authority conferred by the statute law of North Carolina upon the

Southern Railway Company, as a foreign corporation, to become the owner of a railway company created and organized under the laws of North Carolina, and that without express authority from the State a foreign corporation could not become the absolute owner of the franchise and property of a domestic railroad company, such as was the Western North Carolina Railroad Company.

6th. That, being clothed with no express or implied legislative authority to become the owner of the franchise and property of the Western North Carolina Railroad Company, a North Carolina corporation, the Southern Railway Company, while operating the Western North Carolina railroad and controlling the property which is an incident to its franchise, by its consent, was answerable for the torts of its agents and employés whereby persons were killed or injured, but that the domestic corporation was also liable, as is a lessor of a railroad not specially exempted by statute from liability for the torts of a lessee, under the previous rulings of the supreme court of North Carolina in Aycock *vs.* Railroad, 89 N. C., 321, 330, decided at the October term, 1883, of said court, and in Logan *vs.* Railroad, 116 N. C., 940, decided at the January term, 1895, of said court.

Sixth. That theretofore, in May, A. D. 1894, The Central Trust Company, one of the respondents, had filed an original bill in the circuit court of the United States for the western district of North Carolina, at Statesville, against The Richmond and Danville Railroad Company and the said The Western North Carolina Railroad Company, praying for a decree of foreclosure of a second mortgage upon

the franchise and property of said company executed on the 2d day of September, A. D. 1884, but subject to the lien of a first mortgage executed September 1, 1884, on said franchise and property to secure the payment of principal and interest of certain bonds maturing in the year 1914, no default having been made in the payment of the interest accrued on said last-named bonds (see pages —, printed record), and that subsequently to May 3, 1894 (see printed record, pages —), a decree of foreclosure was entered by consent of the defendants in said cause, and in pursuance of said decree the franchise and property of said Western North Carolina Railroad Company was offered for sale by a special master, and the Southern Railway Company, a corporation created and organized under the laws of the State of Virginia, became the purchaser, and the said sale of said franchise and property was confirmed by order of said court, and the said franchise and property was conveyed by said special master to said Southern Railway Company, which thereupon took possession of the road-bed and property of said Western North Carolina Railroad Company on the — day of ——, 1894, by consent of the last-named company, and operated said road as a carrier of freight and passengers until December, A. D. 1896, when the intestates of the petitioners Howard and James were killed by the negligence of said Southern Railway Company, one of said intestates, W. A. James, being a locomotive engineer, and the other, the said John H. A. Howard, a fireman on the same engine, while both were on duty on one of its trains running on the track of the Western North Carolina railroad, and continues to operate said Western North Carolina railroad, claiming title thereto up to the present time.

Seventh. That an action was brought by the petitioner Fannie E. Howard, administratrix of John H. A. Howard, in said superior court of Rowan county, against the said Western North Carolina Railroad Company for damages for the negligent killing of her intestate at the time when said W. A. James was killed, and upon the trial of said action at the ——— term (1898) of said court she recovered judgment against the defendant for the sum of five thousand dollars ($5,000), from which judgment there was no appeal, and that no writ of error was sued out to have the judgment of the supreme court of North Carolina, on said appeal from the superior court of Rowan county in said action entitled James, administratrix, *vs.* Railroad, reviewed.

Eighth. That after the said judgment had been recovered by the petitioner Fannie E. Howard, administratrix, and after the said judgment of the supreme court of North Carolina in James *vs.* Railroad had been certified down to said superior court of Rowan county and judgment had been entered thereon according to said certificate, an action in the nature of a creditors' bill was brought by certain old stockholders of the Western North Carolina Railroad Company, alleging that they were not bound by said decree of foreclosure and asking for the appointment of a receiver, and the petitioners Clemye James, administratrix, and Fannie E. Howard, administratrix, became parties as judgment creditors by virtue of their said judgments against said company.

Ninth. That immediately upon the service of notice of a motion to appoint a receiver, and before a receiver was ap-

pointed, the respondents herein, The Central Trust Company of New York and The Southern Railway Company, filed what was denominated a supplemental bill in said foreclosure suit brought by said Central Trust Company of New York, praying that the plaintiffs in said creditors' bill filed in the superior court of Rowan county be enjoined and restrained from further prosecuting their said action, and from the decree of perpetual injunction granted by Simonton, judge, in said circuit court for the western district of North Carolina, the parties enjoined, the plaintiffs in said proceeding in the superior court of Rowan county, appealed to the circuit court of appeals for the fourth circuit, at Richmond, which court held (98 Fed. Rep., 489) that the judgment below should be so modified as to leave the said Clemye James, administratrix of W. A. James, and the said Fannie E. Howard, administratrix of John H. A. Howard, at liberty to enforce their judgments in the State courts in any other suit or action except that pending, wherein the main relief was that sought by the old stockholders, who were estopped by the said decree of foreclosure in the circuit court of the western district of North Carolina, being represented by the directors of the company who were parties, while the said James and said Howard, not being parties, were not bound by said decree.

Tenth. That upon the mandate sent down to said circuit court in said cause Judge Ewart entered a decree so modifying the said decree of Simonton, judge, appealed from, as "not to prohibit the said Clemye James, administratrix of W. A. James, or Fannie E. Howard, administratrix of John H. A. Howard, from proceeding as they might be ad-

vised with any other suit not based upon the supposed rights of the stockholders of the Western North Carolina Railroad Company with respect to enforcing their judgment," and the said circuit court of appeals refused subsequently to grant a mandamus to compel said circuit court to alter said modified judgment. (See opinion in the record and — Fed. Reporter, —.)

Eleventh. That the supreme court of North Carolina having held in James *vs.* Railroad, *supra*, and later in the cases of Railroad Co. *vs.* Burnett, 123 N. C., 210, and Williams *vs.* Railroad, 126 N. C., 918–920, that no mortgage of an incorporated company would, under the laws of North Carolina (the Code, sec. 1255), operate "to exempt the property and franchise of such corporation from execution for the satisfaction of a judgment obtained in the courts of the State, for torts committed by any such corporation, its agents or employés, whereby any person is killed or any property is injured, any clause or clauses of such mortgage to the contrary notwithstanding," and that the remedy of plaintiffs in such judgments was to sue out execution and enforce their judgments by a sale of the franchise and property of the corporation, notwithstanding the existence of such mortgage or a prior sale under such mortgage, the said Clemye James, administratrix of W. A. James, and Fannie E. Howard, administratrix of John H. A. Howard, through their counsel, proceeded to sue out executions upon their said judgments in the superior court of Rowan county, State of North Carolina, and to cause said executions to be levied upon the franchise and property of said Western North Carolina Railroad Company (which had been held by the supreme court of

North Carolina liable to be sold to satisfy said judgments) by the petitioner D. R. Julian, sheriff of said county, who was, in contemplation of the laws of North Carolina, their agent for such purpose, when the respondents, by supplemental bill in said original foreclosure suit in the circuit court for the western district of North Carolina, applied to Hon. James E. Boyd, as circuit judge of said district, and obtained an order enjoining and restraining said D. R. Julian from selling said franchise or property to satisfy said judgments; whereupon a motion of the other two petitioners, submitted by their counsel, to dismiss the bill, after entering a special appearance, as well as a similar motion of the petitioner Julian, having first been refused, after excepting to said ruling the two said petitioners were made parties defendant on motion of their counsel.

Twelfth. That upon the hearing of the notice to show cause before Boyd, judge, in said circuit court at Greensboro, the injunction was continued, your petitioners appealed, and the decision of the said circuit court of appeals was as set forth in the opinion printed in the record.

Thirteenth. That your petitioners are advised that the supreme court of North Carolina has decided in explicit terms that the two petitioners, James, administratrix, and Howard, administratrix, have the right to enforce their said judgments by a sale of the franchise and property of the Western North Carolina Railroad Company, which is still an existing corporation, and that their remedy, as plaintiffs in execution, was to levy upon said franchise and property, while, on the other hand, the said circuit court of appeals

filed a conflicting opinion, as aforesaid, on the 7th day of May, 1902, at Charleston, affirming the judgment of the Hon. James E. Boyd, judge, sitting as circuit judge, perpetually enjoining your petitioners from proceeding further to enforce the collection of said judgments by a sale of said franchise and property levied upon (all of which appears of record).

Fourteenth. That there is an irreconcilable conflict between the said decisions of the supreme court of North Carolina holding that petitioners have the right to subject said franchise and property to sale under execution to satisfy their said judgments and the said decision of the said circuit court of appeals affirming the judgment of the circuit court, whereby petitioners were perpetually enjoined from selling said franchise by virtue of executions sued out upon said judgments, and your petitioners are advised that where such conflicts arise between circuit courts of appeal and the highest appellate courts of States, as to the construction of the constitution and laws of the State, the Supreme Court of the United States (under its rule laid down in Forsythe *vs.* Hammond, 166 U. S., 506, 514, 515, and in the exercise of its plenary power) will grant a writ of certiorari in order to settle an unseemly controversy as to jurisdiction.

Fifteenth. That your petitioners therefore respectfully submit that under said rule laid down in Forsythe *vs.* Hammond, *supra*, and in the exercise of its plenary power, this court should authoritatively and finally determine and settle the said questions, which have given rise to such unseemly conflict between the court of appeals of the United

States of America and the supreme court of North Carolina.

Wherefore your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States circuit court of appeals for the fourth circuit, commanding said court to certify and send to this court on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of said circuit court of appeals in said case therein entitled David R. Julian, sheriff; Mrs. Clemye James, and Fannie E. Howard, appellants, *vs.* The Central Trust Company of New York and Southern Railway Company, appellees, No. 438, to the end that the said cause may be reviewed and determined by this court, as provided in section 6 of the act of Congress entitled "An act to establish circuit courts of appeals and to define and to regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," affirmed March 3, 1901, or that your petitioners may have such other or further relief or remedy in the premises as to the court may seem appropriate and in accordance with the said act and with the recognized principles of law applicable to the matters set forth in the petition, and that the said judgment of the said circuit court of appeals in said cause and every part thereof be reviewed by this honorable court.

And your petitioners will ever pray.

DAVID R. JULIAN,
CLEMYE JAMES,
FANNIE E. HOWARD,
By ALPHONSO C. AVERY,
Attorney and Counsel for Petitioners.

DISTRICT OF COLUMBIA, }
City of Washington. }

Alphonso C. Avery, being duly sworn, says that he is one of the attorneys and counsel for said David R. Julian, sheriff; Clemye James, administratrix, and Fannie E. Howard, administratrix, petitioners above named, and as such has had personal charge for them of the defense of the suit in equity brought by the Central Trust Company of New York and the Southern Railway Company in the circuit court for the western district of North Carolina against your petitioners, while pending in said circuit court, and of the appeal of your petitioners to the circuit court of appeals from the institution of said suits up to the present time, and also appeared in an action in the superior court of Rowan county entitled Clemye James, administratrix, *vs.* The Western North Carolina Railroad Company, and also in the supreme court of the State of North Carolina, when said last-named action was heard in said court, and in the superior court of Rowan county, when judgment was rendered in 1898 in favor of petitioner Howard, administratrix, and against the Western North Carolina Railroad Company, and has a more perfect and more accurate knowledge of the facts alleged in the petition than the petitioners themselves, and therefore verifies the same, and that the facts therein stated are true to his best information and belief.

ALPHONSO C. AVERY.

Sworn to and subscribed before me this the 3d day of October, 1902.

In witness whereof I have hereunto signed my name and affixed the seal of my office as clerk of the circuit and district court for the western district of North Carolina.

{Seal United States Circuit Court, Western Dist. of N. C., at Asheville.}

W. S. HYAMS, *Clerk.*

PETITION FOR WRIT OF CERTIORARI.

UNITED STATES CIRCUIT COURT OF APPEALS

OCTOBER TERM, 1902.

No. 457.

DAVID R. JULIAN, SHERIFF, MRS. CLEMMYE JAMES, ADMINISTRATRIX, and MRS. FANNIE HOWARD, ADMINISTRATRIX, Appellants, Petitioners,

against

THE CENTRAL TRUST COMPANY and THE SOUTHERN RAILWAY COMPANY, Appellees, Respondents.

BRIEF FOR PETITIONERS.

A. C. Avery, Lee S. Overman, and C. A. Mountjoy, Solicitors for Petitioners.

SUMMARY OF FACTS.

The facts relied upon to show such conflict in the decisions of the Circuit Court of Appeals for the Fourth Circuit and the decisions of the Supreme Court of North Carolina, as will bring the application for writ of certiorari within the rule laid down in *Forsyth v. Hammond*, 166 W. S., 506, 514, 515, are briefly set forth in the petition for writ of certiorari.

In the year 1899, Mrs. James, administratrix of her deceased husband, W. A. James, brought an action in the Superior Court of Rowan County, North Carolina, against the Western North Carolina Railroad Company, for damages for the negligent killing of her intestate, and recovered judgment in said Court for fifteen thousand dollars. The Southern Railway Company was not a party to said

action, but was operating at the time the line of railway between Salisbury and Paint Rock, in said State, and built under authority of the charter of the Western North Carolina Railroad Company, on which plaintiff's intestate was killed; and intestate was then employed by the Southern as a locomotive engineer. From a ruling of the Judge below, that, upon the facts found, the plaintiff was not entitled to recover, the plaintiff, administratrix, appealed to the Supreme Court of North Carolina, when the judgment was reversed and the Court below was directed to enter judgment against the Western North Carolina Railway Company for the amount of damages assessed and costs. (See *James v. Railroad*, 121 N. C., 523.)

The defence relied upon in the State Court was, that the Southern Railway Company, a corporation created by and organized in the State of Virginia, had acquired title to the franchise and property of the Western North Carolina Railroad Company as purchaser under a decree of foreclosure of a second mortgage made by said Western North Carolina Railroad Company, on the 2d day of September, 1884, subject to a first mortgage made by it on the 1st day of September, 1884. (See record, pages 95 and 129.)

The respondents here rely upon the same record of the foreclosure suit in the Circuit Court of Appeals and the decree of the sale, report of sale, and decree of confirmation set up in the State Court, to show that the Western North Carolina Railroad Company was no longer an existing corporation, but that its franchise and property, notwithstanding the outstanding first mortgage, had been acquired by the Southern Railway Company of Virginia.

The Supreme Court of North Carolina held that the Western North Carolina Railroad Company was still an existing domestic corporation of North Carolina, and that under statutes of the State, enacted long before said mortgages were executed, or said sale made, a foreign purchaser was required, as a condition precedent to operating a road

organized under a domestic charter and so sold, to organize as a domestic corporation.

The State Court held that under a settled line of decisions of the State Court, extending back before the execution of said mortgages or sales thereunder, where an existing railway corporation allowed its road to be operated by another company, both companies were liable to answer in damages for injuries caused by the negligence in operating trains so suffered to run.

During the year of 1897 the petitioner, Fannie E. Howard, as administratrix of her husband, John H. Howard (who was fireman on the same engine of which W. A. James was engineer), also brought suit against the Western North Carolina Railway Company for the negligent killing of her intestate, by the same collision which caused the death of James, and recovered, in the Superior Court of said county, judgment for five thousand dollars. By consent of parties, this judgment was to abide the decision of the Supreme Court of North Carolina in *James v. Railroad, supra.*

Upon he coming down of the certificate from the Supreme Court, judgment was entered in favor of the plaintiff, Mrs. James, in the Superior Court of Rowan County, in accordance with the opinion of the appellate Court. During the same term of said Superior Court a creditor's bill was filed by S. T. Pearson *et al.*, who had been stockholders in the Western North Carolina Railroad Company, before the company was reorganized in 1880, or issued its first mortgage bonds, on the 1st day of September, 1884, or its second mortgage bonds, to enforce the payment of which the foreclosure suit was brought, on the 2d of September, 1884. (See pages 95 and 127 of the printed record.) The plaintiff, Pearson, and other stockholders, were seeking to go behind the foreclosure decrees, and invited creditors of the Western North Carolina Railroad Company to join in asking for a receiver for said company, to take charge of its property, then in the hands of the Southern Railway Com-

pany, and which could not otherwise be subjected to the payments of its debts. The said Superior Court made an order requiring said Western North Carolina Railroad Company (which had answered in said actions brought by James, administratrix, and Howard, administratrix, by its President, A. B. Andrews), to show cause why a receiver should not be appointed. Thereupon the Central Trust Company of New York and the Southern Railway Company, as purchaser under said foreclosure decree, filed a supplemental bill entitled as of said foreclosure suit, asking to enjoin the plaintiffs in said creditor's bill filed in the Superior Court of Rowan County from proceeding further in their said action, on the ground that said plaintiffs were estopped by said decree of foreclosure. (See record, pages 108 to 123.) Upon the hearing of supplemental bill before Judge Simonton, in the Circuit Court for the Western District of North Carolina, the temporary restraining order previously granted by him was made perpetual (see printed record, page 181), and the respondents appealed to the Circuit Court of Appeals for the Fourth Circuit, at Richmond. (See decree of the Circuit Court and opinion of Simonton, Judge, printed record, page 181 and omitted by consent, see page 198.) The said Circuit Court of Appeals affirmed the judgment of the Circuit Court in so far as it restrained the old stockholders, S. T. Pearson and others, from further proceeding in the State Court to enforce their demands, and, in so far as it restrained Mrs. James and Mrs. Howard from further prosecuting said creditor's bill (on the ground that the gravamen of the bill was the relief sought by the old stockholders who were estopped by the foreclosure decree, being represented by the directors of their company as parties); but said Court of Appeals held that the said decree granted by Simonton in the Circuit Court should be so modified as to leave Mrs. James and Mrs. Howard, who were not parties to said foreclosure suit, at liberty to proceed, as they might be advised to enforce their judgments obtained in the Superior

Court of Rowan County. (See decree and mandate of said Circuit Court of Appeals, pages 34 and ..., and opinion, pages 194 to 198, of printed record; 98 Fed. R., 489.)

Upon the going down of the mandate to said Circuit Court a decree was entered in said Court, by Judge Hewart, so modifying the former decree made by Judge Simonton, as to leave Mrs. James and Mrs. Howard, at liberty to proceed in any action other than said creditor's bill, as they might be advised, to collect their judgments in the State Court. (See printed record, near bottom of page 197.)

Subsequently the appellees (the respondents here) filed a petition for mandamus in said Circuit Court of Appeals to compel the Circuit Court below to so modify the said decree as to declare that the said Mrs. James and Mrs. Howard were estopped from denying the title of the Southern Railway Company acquired by said purchase under said foreclosure decree; but said Circuit Court of Appeals refused to grant said writ. (See pages ... and... of printed record.)

Subsequently, the Supreme Court of North Carolina held (*Railroad v. Burnett*, 123 N. C., 2 0, 131 S. E. R., 602; *Williams v. Railway Co.*, 126 N. C., 918), that the remedy of plaintiffs who recover judgments against corporation for damage for negligence must be enforced, if at all, by levying upon the franchise and property of corporation, the statute (The Code, Sec. 1255, Act of 1879, Chap. 101) having provided that no mortgage executed by a corporation should be deemed a lien upon its franchise and property, as against such after acquired judgment for damages for negligently injuring persons or property. In conformity to these rulings of the State Court, Mrs. James and Mrs. Howard caused to be issued from the Superior Court of Rowan County executions on their said judgments (see pages 57 and 59 of printed record), and placed said executions in the hands of the petitioner, D. R. Julian, Sheriff of Rowan County, who, under the instructions of Mrs.

James and Mrs. Howard, levied said executions upon the franchise and property of the Western North Carolina Railroad Company, the State of North Carolina having provided that executions against such corporations should be levied upon the franchise and property.

The respondents, Central Trust Company, of New York, and the Southern Railway Company, thereupon filed another supplemental bill, entitled as of said foreclosure suit against the petitioner, D. R. Julian, Sheriff, and a temporary restraining order was granted by Judge Boyd, of the Circuit Court of the Western District of North Carolina, a few days before the time appointed to sell said franchise. (See pages ... and 3 of printed record.) No notice of the filing of said bill or order was given to the petitioners, Clemmye James, administratrix, or Fannie E. Howard, administratrix, who are both residents of the Western District of North Carolina.

Upon the return of the order to show cause why said injunction should not be made perpetual, the petitioner, Julian, filed a written motion to dismiss, on the ground that an injunction did not lie against him, without joining the plaintiffs in execution, he being their agent. The motion was refused and petitioner, Julian, excepted. (See printed record, pages 9 and 8.) He thereupon filed his answer. (See page 4 of record.)

The petitioners, James, administratrix, and Howard, administratrix, thereupon entered a special appearance, and moved to dismiss the bill, on the ground that the bill and order had been served only upon said Julian. The said motion was refused; the petitioners, James and Howard, excepted (see pages 6 and 9 of record), and said petitioners thereupon filed their answer. (See page 9 of record.)

Upon the hearing of the bill, answer and proof offered the Court continued the injunction, and from its decree the petitioners appealed to the Circuit Court of Appeals for the Fourth Circuit. (See pages 3, 42, 9 of record.)

The said Circuit Court of Appeals, at its session at

Charleston, filed its decision, affirming the decree of said Circuit Court of Appeals, rendered by Judge Boyd, at Greensboro, and, as petitioners contend, overruling its former decision in said case, upon appeal from Judge Simonton, as Circuit Judge. (See opinion of the Circuit Court of Appeals, filed for the Court by Judge Simonton, and the decree, pages 194 and 199 of printed record.)

There is a conflict of opinion, which is unseemly, and which can not be settled except by the Supreme Court.

The Supreme Court of North Carolina said, in *James v. Railroad*, 121 N. C., at page 529:

"*But the old corporation still in existence* is liable for damages by the maladministration of the "Southern," which is allowed to run and operate the road. *But the property of this road, which the "Southern" is allowed to use, will be held liable to the public for damages.*"

Judge Simonton, in the opinion, says, for the Court of Appeals (at page ... of record), referring to the Western North Carolina Railroad Company: "It did not have, on 21st February, 1898 (the day on which the judgment, upon which the execution complaint of in this case (in *James v. Railway, supra*) was rendered), any *interest, right, estate or property in the road levied upon, or in its equipment, rolling stock, franchise, or property of any description. All of these had become and were vested in the Southern Railway Company*, the purchasers under the decree of the Circuit Court of the United States for the Western District of North Carolina. *The Sheriff under this precept had no right to levy upon and advertise the same for sale.*"

On the other hand, the Supreme Court of North Carolina, in *Railroad v. Burnett*, 123 N. C., 210, 213, 214, 215, construed, in its applications to cases of this kind, The Code, Sec. 1255, Act of 1879, Chap. 101, which was enacted more than five years before the first mortgage of the Western North Carolina Railroad Company, which is still outstanding, was executed on the 1st of September, or the second mortgage, which was foreclosed on the 2d of Septem-

ber, 1884, is as follows: "Mortgages of incorporated companies, upon their property or earnings, whether in bonds or otherwise, hereafter issued, *shall not have power to exempt the property or earnings of such incorporations from execution for* the satisfaction of any judgment obtained in Courts of the State against such incorporation, for labor performed, nor for material furnished such corporation, *nor for torts committed by such incorporation, its agent or employees, whereby any person is killed, or any person or property injured, any clause or clauses in such mortgage to the contrary notwithstanding.*"

The Court held in that case that mortgages of incorporated companies did not exempt their property from judgments obtained in the Courts of the State against them for labor performed, nor for torts committed, and that it made no difference whether the mortgaged property was sold before or after the judgment, where the purchaser took with notice.

The Court held that the *mortgage contract was entered into* by the mortgagee *in contemplation of the Act of 1879, and said act was, therefore, written into the contract.*

"The principle underlying this decision and upon which it is decided is, *that under Section 1255 of The Code the mortgage conveyed nothing as against this claim; and, as it conveyed nothing as against this claim, the purchaser got nothing as against this claim by the mortgage sale.*"

Railroad v. Burnett, at page 215.

"*Another ground the plaintiff takes is, that the mortgaged property was sold under a decree of the Circuit Court of the United States, having jurisdiction of the matter and the power to foreclose the mortgage and to make an order of sale. This is not disputed. But the defendant was not a party to that suit, and no rights that the defendant Burnett had are affected by this decree and order of sale.* Therefore, the fact that *the plaintiff* claims under a sale, made under a decree of foreclosure and order of

Court, does not affect the rights of the defendant Burnett. *The order was based on the mortgage and conveyed no more than was conveyed by the mortgage. It conveyed no more than would have been conveyed by a foreclosure of the mortgage, under a power of sale contained in the mortgage.*"

Railroad v. Burnett, at pages 214, 215.
Howe v. Harper, 127 N. C., at pages 357, 358.

In *Williams v. Railway Company*, 126 N. C., 918, 920, 921, the Court, after quoting the passages above set forth, said:

"The intervenor here was not a party to the foreclosure proceeding and did not seek to be made a party till after the sale had been made under it. The purchaser stands in the shoes of the original debtor, bought only such interest as he could mortgage as against the Falls of Neuse Manufacturing Company, and has no right to share in the proceeds of such sale. *It must proceed against its debtor and assert its rights by execution against the property, notwithstanding the foreclosure sale, just as was held in Railroad v. Burnett, supra.*

But here, as in Railroad v. Burnett, the judgment for tort was obtained after the sale under foreclosure, and after the property was turned over to the purchaser, and there was no obstruction of the petitioner's execution by any action of the Court; as to it, the mortgage and any rights obtained under it, either by bondholders or purchasers, are non-existent. Hancock v. Wooten, 107 N. C., 9, which holds that in a creditor's bill the creditors uniting in the action to set aside a fraudulent assignment acquire a preference by way of an equitable lien, has no application in this case. *Goldberg v. Cohen*, 119 N. C., 68."

The Supreme Court of North Carolina held that the legal title to the franchise and property of the Western North Carolina Railroad Company was still vested in the Central Trust Company after the sale, and that while the

Southern Railway Company had become bound to see that debt discharged, the power was still lodged in the Central Trust Company to foreclosure the first mortgage if the Southern should fail to pay accruing interest on the first mortgage bond or the principal at maturity.

The language of the Court in *James v. Railroad*, at page 527, is as follows:

"*At the time the second mortgage was executed, the legal title to this property was in the Central Trust Company, of New York, having been conveyed to this company by the first mortgage, and the Western North Carolina Railroad Company had only the equity of redemption when it executed the second mortgage, and only the equity of redemption at the time of said sale. And as the Southern Railway Company claims under the second mortgage, it can have no more, no greater estate, than the Western North Carolina Railroad Company had at the date of the sale under the second mortgage.*"

By the sale of the special master under the second mortgage, the purchase *thereunder and the express assumption of the first mortgage debt binds the purchaser, the Southern Railway Company, for this debt.* And as between the Southern and Western, it makes the Southern the principal and the Western its surety. But this does not release *the "Western nor the property mortgaged to pay the debt from liability.* And this, *it seems to us, would be a reason for not considering the Western North Carolina Railroad Company as extinct. Woodcock v. Bostic*, 118 N. C., 823; *Keller v. Ashford*, 133 U. S., 610."

Upon the same question Judge Simonton, for the Court, said, in its last opinion (see page ... of record):

"The purchaser was put into possession. To all these proceedings the Central Trust Company, holder of the first mortgage, was a party, moving for and assenting to all the decrees therein, recognizing the *Southern Railway Company as the owner of the equity of redemption and as the party liable for the payment of the bonds first issued under*

the first mortgage. It thus appears that the Western North Carolina Railroad Company, originally the owner of this property, with authority to alien, sell or mortgage the same, then the mortgagor, then the owner of the equity of redemption, its only means of procuring release of the mortgage, then the mortgagor of this equity of redemption, by a decree of a Court of competent jurisdiction, in a suit to which it was a party appearing and answering, was forever debarred and foreclosed of all right and equity therein, including this equity of redemption."

The Code of North Carolina prescribes how sales of corporations, "authorized to receive fare and tolls," shall be made as follows:

"Section 671. If any judgment or decree shall be rendered against a corporation, the plaintiff may sue out such execution against the property of a corporation as is provided in this Code to be issued against the property of natural persons, which executions may be levied as well on the current money as on the goods, chattels, lands and tenements of such corporation; and *if the judgment or decree be against any corporation authorized to receive fare or tolls,* the franchise of such corporation, with all the rights and privileges thereof, so far as relates to the receiving of fare or tolls, and also all other corporate property, real and personal, may be taken on execution and sold under the rules regulating the sale of real estate.

"Section 672. When an execution has been sued out and levied upon the personal property of a corporation, such personal property may be sold, and the title to such property shall pass to the purchaser at said sale, independent of the franchise and real estate of such corporation.

"Section 673. In the sale of the franchise of any corporation, the person who shall satisfy the execution with all costs thereon, or who shall agree to take such franchise for the shortest period of time, and to receive during that time all such fare and toll as the said corporation would by law

be entitled to demand, shall be considered as the highest bidder.

"Section 674. The officer making sale shall by deed convey to the purchaser all the immunities and privileges which by law belong to the corporation, so far as relates to the right of demanding fare and toll; and the officer shall, immediately after such sale, deliver to the purchaser possession of all the corporate real property connected with the franchise belonging to such corporation, in whatever county the same may be situated, and the purchaser may thereupon demand and receive to his own use all the fare and toll which may accrue within the time limited by the term of his purchase in the same manner and under the same regulations as such corporation was before authorized to demand and receive the same.

"Section 676. The corporation whose franchise shall have been sold as aforesaid shall, in all other respects, retain the same power and be bound to the discharge of the same duties and liable to the same penalties and forfeitures as before such sale."

Construing the foregoing, in 1859, the Court held that the purchaser at such sale would be such person as offered, first, to pay the debt; second, to take the fare and toll in satisfaction for payment for the shortest period, it being permissible to bid for the whole period of corporate executive, or any less term of years.

Taylor v. Jenkins, 51 N. C., at page 320.

By reference to the record, pages 55, 57, it will appear that the petitioner, Julian, was proceeding to sell the franchise, in the manner indicated in *Taylor v. Jenkins, supra,* under the Act of 1820, as amended, and was acting under *Railroad v. Burnett,* and other cases cited above, which declared that the judgment must be enforced by sale of the franchise and property under the execution.

Judge Simonton, in the opinion, says:

"The act of the Sheriff in levying on this property clearly

was illegal" (record, page 205), whereas, the Supreme Court of North Carolina said the corporation, the Western North Carolina Railroad Company, was still in existence, and its franchise (which was the soul of this artificial person, sometimes called "soulless"), and property were still liable for the satisfaction of these very judgments.

The State Court pointed out the duty of the sheriff, as to what to sell and how to sell it; but when he attempted to follow its decision, as directed by the State Court, the Federal Court declared that he went "outside of his official duty and was a bald trespasser." (See printed record, pages 206, 204.) The Supreme Court Of The State Adheres To Its Opinion in *James v. Railroad, supra,* And Speaking Of That Decision At The August Term, 1901, Said,

"We can only say that we reaffirm that case in every essential particular. We are of opinion that the Western North Carolina Railroad Company still exists under its charter as a North Carolina corporation. If it does not so exist, then it has no legal existence whatever; and grave questions must arise as to the illegal use of its franchise and the tenure of its easement.

While we are of the opinion that the construction of the statutes of this State is peculiarly within our jurisdiction, and especially those creating corporations which have no natural right of existence, we do not think that the case of James v. Central Trust Company, 98 Fed. Rep., 489, tends to sustain any doctrine inconsistent with those laid down by us in the James Case.

Perry v. Railroad, 129 N. C., at pages 334, 335.
Mowery v. Railroad, 129 N. C., at page 354.

The Court adheres to the decision in Logan v. Railroad, 116 N. C., 940 (see discussion of the case in Harden v. Railroad, 129 N. C., at pages 356, 357, 359, 361 to 363), and the following in Perry v. Railroad, 129 N. C., at page 335:

"If this exception is intended to raise the question of the liability of the lessor, we can only repeat what we said before, 'That a railroad company leasing its road is liable for the negligence of its lessee in the operation of the road, is well settled in this State.'

Aycock v. Railroad, 89 N. C., 321, 330.
Logan v. Railroad, 116 N. C., 940.
Tillett v. Railroad, 118 N. C., 1031, 1043.
James v. Railroad, 121 N. C., 523, 528.
Benton v. Railroad, 122 N. C., 1007, 1009.
Norton v. Railroad, 122 N. C., 910, 937.
Pierce v. Railroad, 124 N. C., 83, 93.
Perry v. Railroad, 128 N. C., 471, 473.
Raleigh v. Railroad, and Harden v. Railroad, at this term."

THE CIRCUIT COURT ERRED IN REFUSING TO DISMISS FOR WANT OF SERVICE ON PROPER PARTIES, WITHOUT REGARD TO THE MERITS OF THE DEFENCE, AND THE COURT OF APPEALS ERRED IN FAILING TO SUSTAIN THE EXCEPTION TO THE RULING BELOW. THE PETITIONERS WISH TO HAVE THE CAUSE DECIDED UPON THE QUESTION OF JURISDICTION BY THE SUPREME COURT, BUT CONTEND THAT THEY ARE ENTITLED TO RECOVER COST, IN ANY EVENT, FOR SAID ERROR.

The old Court of Equity of North Carolina uniformly held, as has since been the settled rule under the new procedure that a sheriff who levies an execution, being the mere agent of the plaintiff and presumed to sell, or refrain from selling, under the direction of the plaintiff, is not a proper party-defendant in a suit brought to restrain him from selling thereunder, and that a bill, asking such relief as to such sheriff, must be dismissed with costs as to him. The Court erred in refusing to dismiss as to him. (See printed record, page 9.)

Edney v. King (4 Ired. Eq., 465); (39 N. C., 465).
Lackey v. Curtis, 6 Ired. Eq., 199 (41 N. C., 199).
McLean v. Manning, Winston Eq. (60 N. C., 668).

Where the sheriff is allowed to be made a party, for the sake of giving him notice, it seems to be the universal rule that he is merely a nominal party and no relief can be granted against him.

10 Enc. of Pl. and Pr., p. 916, and note 1.

Though the Sheriff was the agent of the plaintiffs in execution, in the sense that he was presumed to levy and sell, or refrain from selling, under their direction, there is no common law rule and no statutory provision, which makes service of any process upon him sufficient to bring the plaintiffs in execution before the Court. This proposition is elementary, and needs no citation of authority to sustain it. When the petitioners, James and Howard, entered a special appearance, the motion to dismiss the bill ought to have been alowed. (See printed record, pp. 9 and 8.)

THE QUESTION OF JURISDICTION.

THE BURDEN RESTS UPON THE RESPONDENTS TO BRING THEIR CLAIM TO RELIEF UNDER SOME RECOGNIZED EXCEPTION TO THE GENERAL RULE EMBODIED IN SECTION 720 OF THE REVISED STATUTES OF THE UNITED STATES.

"The writ of injunction shall not be granted by any Court of the United States to stay proceedings in any Court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

It is not pretended that this injunction is authorized by any law relating to bankruptcy. It will not be denied

that Congress had the power to prescribe limits to the jurisdiction of its creatures, the Federal Courts. Congress has declared, in the section quoted above, that "*The writ of injunction shall not be granted* by any Court of the United States to stay proceedings," etc., except as authorized in bankrupt laws. The mandatory phohibition could not be couched in plainer or more unmistakable language.

It is not denied that the Circuit Court of the Western District of North Carolina is a Court of the United States.

It is acknowledged that this Court has granted a writ of injunction to stay proceedings in the Superior Court of Rowan County, to-wit, to restrain the Sheriff of Rowan County from proceeding to sell property levied upon by him and advertised to be sold by virtue of an execution issuing from said Court.

It is admitted that the Superior Court of Rowan County is a "Court of a State."

The momentous question, whether the Circuit Court had exceeded the plainly prescribed limits of its jurisdiction, was disposed of in the opinion of the Circuit Court of Appeals, without citing a single authority, in one short paragraph and as a matter of minor importance remaining, as follows:

"The only remaining question is, can the Circuit Court of the United States interfere with this State officer, or is it precluded by the provisions of section 720 of the Revised Statutes of the United States? It will be observed that no question is made upon the validity of the judgment of James, administratrix, and of Howard, administratrix, in the State Court. We do not sit to review these judgments, nor have we the right to do so. The case made shows that Julian, the sheriff, is attempting to sell for the satisfaction of judgments against the Western North Carolina Railroad Company, property in which that company has no interest or estate whatsoever. He has been enjoined, not from or because of the use of process, but

because of the abuse of process. When he seeks to subject the property of the Southern Railway Company, by levying upon it under a judgment to which it was not a party, for the payment of the judgment against the Western North Carolina Railroad Company, he goes outside of his official duty, and becomes a bold trespasser."

The petitioners contended before the Circuit Court of Appeals, *that it had been repeatedly held, that a Federal* Court could not enjoin service of process issued by a State Court or the enforcement of the judgment of a State Court or restrain sales of property by virtue of executions issued on a judgment of a State Court, and that the prohibition of section 720, Revised Statutes, extended both to attempts of Federal Courts to restrain the issuing of process and its execution by officers of the State Court.

Sargent v. Helton, 115 U. S.

Haines v. Carpenter, 91 U. S., 284.

Dial v. Reynolds, 96 U. S., 340 (cited in the opinion of Morris, Judge, 98 Fed. Rep., 489).

THE QUESTION OF JURISDICTION WAS TREATED BY JUDGE MORRIS, 98 FED. REP., 489, AS THE MAIN QUESTION WHICH CONFRONTED THE COURT AT THE THRESHOLD OF ITS EXAMINATION, AND THE COURT THERE CONCLUDED THAT THE PROHIBITION OF SECTION 720 COULD ONLY BE EVADED BY SHOWING THAT MRS. JAMES AND MRS. HOWARD WERE PARTIES TO OR BOUND AS PRIVIES BY THE JUDGMENT IN THE FORECLOSURE SUIT.

The Court said in its opinion, 98 Fed. Rep., 489:

"Neither Mrs. James nor Mrs. Howard could be said, we think, to be in any sense a party to the foreclosure suit or bound by it. Whatever rights they have accrued to them three years after the sale and had no connection whatever with the rights that were adjudicated by the decree. It may be, notwithstanding anything adjudicated by the decree, that under the laws of North Carolina the

Western North Carolina Railroad Company was answerable to them for damages, for which they obtained their judgment, and the railroad, now in possession of the Southern Railway Company, also liable. *These are questions not litigated in the foreclosure suit, and which the appellees, in our judgment, could not by this supplementary and ancillary proceedings compel Mrs. James and Mrs. Howard to bring before the Circuit Court.*"

In the concluding clause of the opinion the Court held and directed that:

"*The decree should be so modified as not to prohibit Mrs. James and Mrs. Howard from proceeding as they may be advised with any other suit not based upon the supposed rights of the stockholders.*" (See printed record, bottom of page 197.)

THE COURT OF APPEALS CORRECTLY DECIDED IN THE SAME CASE 98 FED. REP., 489, THAT MRS. JAMES AND MRS. HOWARD WERE NEITHER PARTIES NOR PRIVIES TO THE FORECLOSURE SUIT, AND, NOT BEING ESTOPPED BY THE FORECLOSURE DECREE, WERE PROTECTED IN PROCEEDING TO ENFORCE THE COLLECTION OF THEIR JUDGMENTS, BY SECTION 720. THE COURT, IN ITS LAST DECISION, OVERRULES ITS FORMER DECISION WITHOUT DISCUSSION, AND, IN EFFECT, AFFIRMS THE CIRCUIT COURT JUDGMENT, WHICH IT HAD FORMERLY MODIFIED, SO AS TO LEAVE MRS. JAMES AND MRS. HOWARD AT LIBERTY TO PROCEED, AS THEY MIGHT BE ADVISED, TO ENFORCE THE COLLECTION OF THEIR JUDGMENTS.

The disregard of the prohibition contained in section 720 by a Federal Court is judicial usurpation, unless Mrs. James and Mrs. Howard were either parties to the foreclosure decree, or are now in privity with the Western North Carolina Railroad Company, by reason of claiming by, through or under said company. The Circuit Court

of Appeals intimates, that Mrs. James and Mrs. Howard are estopped, but nowhere so declares in plain terms. In its last opinion, the Court of Appeals said:

"It was insisted upon, in argument, that the Southern Railway Company, being a corporation of the State of Virginia,can not *hold railroad property in North Carolina. This question can not arise in this decision.* Whatever may be the law in this regard, the title of the Southern Railway Company can not be *disputed by the Western North Carolina Railroad Company or any person claiming by, through or under it.* The decree of the Circuit Court of the United States for the *Western District of North Carolina, confirming the sale in a cause to which the* Western North Carolina Railroad Company was a party, estops it."

What are *contentions* Of The Southern On The One Part And The Plaintiffs James and Howard On The Other?

The claim of the Southern Railway Company, as stated by Judge Simonton, is, that it became the purchaser under a deed executed and recorded, in pursuance of the decree of foreclosure, the sale and decree of confirmation, and that, "to all these proceedings the Central Trust Company, holder of the first mortgage, was a party, moving for and assenting to all the decrees therein, recognizing *the Southern Railway Company as the owner of the equity of redemption and as the party liable for the payment of the bonds* first issued under the first mortgage."

Mrs. James and Mrs. Howard contend:

That the assent of the Central Trust Company, the trustee with power of sale in both the first and second mortgages, to the decree of foreclosure under the second mortgage, and expressly subject to its lien, did not relieve said Trust Company if its obligation to sell the franchise and property, at the instance of any of the holders of the first mortgage bonds, for default in the payment of interest or principal at maturity, even though the trustee did

recognize the Southern Railway Company as the owner of the equity of redemption, and as a party liable for the payment of the bonds first issued under the first mortgage. The holders of the first mortgage bonds, amounting to $3,856,000 (see record, page 128), expressly refused to agree to surrender their prior lien if they were consulted, though they are not parties to the suit and are not bound by the decree, for it appears (see pages 113, 116, 120, 124 and 129), that, in the decree of sale, order of sale, advertisement of the property by the master, report of sale and decree confirming sale, at every stage of the proceeding, the rights of the holders of the first mortgage bonds were studiously protected by reserving, in the sale under the second mortgage, their superior lien. How, then, could the Court of Appeals jump to the conclusion that the Southern Railway Company was accepted as pay master and that lien was discharged?

If the lien was not discharged, then the trustee may be called upon to foreclose for default in the payment of the principal of the first mortgage bonds at maturity, in 1814, or for failure to meet interest before maturity. Neither the promise of the Southern Railway Company, nor the promise of any other capitalist, recognized in the orders in a suit in equity, will discharge an existing first lien, recognized in the very same orders and reserved.

What would the Central Trust Company sell, if called upon in case of default, to satisfy the lien of the first mortgage bonds?

Clearly it would sell what was mortgaged and that upon which the lien was reserved. If so it would sell the franchise, and the franchise could not be sold unless it existed. As long as the franchise exists, subject to such lien, a North Carolina corporation exists, and, so long as it exists, the lien of the first mortgage is no lien against a judgment for tort, under a statute, existing when the mortgage debt was contracted, and the mortgage security accepted subject to its provisions.

Railroad v. Burnett, and authorities cited, *supra*.
The Code of N. C., section 1255, quoted, *supra*.

"These opinions are expressly put upon the ground that the mortgages were void as to such claims and that the property stood, so far as such claims are concerned, just as if no mortgage had been made."

Railroad v. Burnett, 123 N. C., at page 214.

If the defendants in the foreclosure suit, the Richmond and Danville Railroad Company, the lessee then operating the lien of the mortgaged company, and the Western North Carolina Railroad Company, managed, before and after being placed in the hands of a receiver, to meet the interest, as it accrued, on the first mortgage bonds, so as to prevent a default as to them, the plaintiff, trustee, the Central Trust Company, had a right to agree that the foreclosure and sale should be subject to the lien of the first mortgage. They had a right to agree in addition, by a consent decree, that the Southern should be deemed responsible for the debt. But they could not reserve the lien then, and say now, that it was discharged by the simple promise of the Southern to pay.

THE PETITIONERS INSIST THAT THE SUPPLEMENTAL BILL BE DISMISSED AND THE INJUNCTION DISSOLVED, BECAUSE THE PETITIONERS, NOT BEING PARTIES OR PRIVIES TO THE FORECLOSURE SUIT, CAN NOT LIKE A STOCKHOLDER REPRESENTED IN THE SUIT BY THE DIRECTORS OF HIS COMPANY, BE DEEMED CONCLUDED BY THE DECREE.

ROOT VERSUS WOOLWORTH, 150 U. S., 401, IS NOT IN POINT.

Because there the party enjoined, in the ancillary or supplemental proceeding, was the party whose interest in the very property in controversy was adjudicated under the

original bill, and the party, at whose instance he was enjoined, was the assignee of the complainant, who obtained the original decree or judgment determining the title to the land in controversy, and, being in privity with the original claimant, had the right, by a supplemental decree in equity in the nature of a writ of assistance at law, to enjoin the original defendant and those in privity with him from disputing a judgment, which bound them as parties or privies.

Root v. Woolworth, *supra,* can not govern a case (though cited in the decision by Judge Simonton) where parties, like Mrs. James and Mrs. Howard, claim adversely, and not under the party, whose property they seek to subject. They come before the Federal Court, insisting, as they did in the State Courts, that the first mortgage lien is still outstanding against all others, but not against them, and that they have a right to still further proceed against the defendant in execution (not under said defendant), and sell its franchise and property. Was it ever held before in any Court that a party, holding a judgment and issuing execution thereon and levying upon the property of the judgment debtor, was estopped, as a claimant under the debtor, by a decree, to which the debtor but not the creditor, was a party? It is a ruling evolved, since Judge Morris, speaking for the same Court, stated as a proposition, self evident upon a review of the record, that Mrs. James and Mrs. Howard, being neither parties nor privies, were not estopped by the foreclosure decree.

In James *et al.* v. The Central Trust Company *et al.*, 98 Fed. Rep., 489 (printed record, page 196), Judge Morris, for the Court, said:

"The rule that a sale of real estate under judicial proceedings concludes no one who is not in some form a party to the proceedings (DuPassuer v. Rocheran, 21 Wall., 130-135), has been applied by the Supreme Court of the United States to a foreclosure sale of telegraph lines (United

Lines of Telegraph Co. v. Boston, etc., Trust Co., 147 U. S., 431-448), and to a foreclosure sale of a railroad. Pittsburg, etc., Railroad v. Loan and Trust Co., 172 U. S., 493-515.)

Neither Mrs. James nor Mrs. Howard could be said, we think, to *have been in any sense a party to, or claiming under any party to the foreclosure suit or bound by it.* Whatever rights they have accrued to them three years after the sale, and had no connection whatever with the rights which were adjudicated by the decree. *It may be, notwithstanding anything adjudicated by that decree, that under the laws of North Carolina the Western North Carolina Railroad Company was answerable to them for the damages for which they obtained their judgments, and the railroad, now in possession of the "Southern Railway Company, also liable."*

NO CASE IS CITED IN THE LAST OPINION OF THE CIRCUIT COURT OF APPEALS WHERE A PERSON, NATURAL OR ARTIFICIAL, WHO WAS NEITHER A PARTY NOR A PRIVY TO A SUIT IN EQUITY WHEREIN A FINAL DECREE WAS ENTERED IN A CIRCUIT COURT OF THE UNITED STATES, HAS BEEN MADE A PARTY BY SUPPLEMENTAL BILL AND HELD TO HAVE BEEN ESTOPPED BY SUCH FINAL DECREE IN THE ORIGINAL PROCEEDING.

In maintaining that section 720 of the Revised Statute does not operate to prohibit issuing injunctions, in the nature of writs of assistance at law, against persons who are neither parties to nor in privity with any party to the original suit, the decision brought up for review is unique. If such doctrine can be sustained, it is in vain for Congress to erect barriers that can not be torn down by "*Judge-made*" law.

THE NORTH CAROLINA DECISIONS MIGHT HAVE BEEN REVIEWED BY WRIT OF ERROR IN

THIS COURT, AS POINTED OUT IN THE OPINION OF JUDGE MORRIS, 98 FED. REP., 489.

By reference to the record (pages 27, 71 and 84) it will appear that A. B. Andrews, Vice-President of the "Southern," verified the answers of the Western North Carolina Railroad Company in the suits brought against it by the petitioners, and that the counsel of the "Southern" appeared for the "Western North Carolina." Yet they would not ask for a writ of error, nor would the "Southern" assert its rights by organizing as a domestic corporation in the way pointed out by the Supreme Court of North Carolina.

In James v. Railroad, 121 N. C., at pages 528, 529, the Supreme Court said:

"The corporation is an entity, resting upon a grant of the sovereign and clothed with some portion of the sovereignty. A railroad corporation is quasi public, and these extraordinary powers—franchise—are supposed to be granted for the benefit of the people as well as for the benefit of the corporators. It is presumed, by the acceptance of the franchise, that the corporators accept it subject to its burdens. This being so, it can not be that the corporation could sell and transfer this franchise (this sovereignty) without the express permission of the sovereign (the Legislature) to do so. Logan v. Railroad Company, 116 N. C., 940; Railroad Co. v. Winans, 17 How., 30."

It is claimed by the "Southern" that this express authority is given by section 687 and 698 of The Code. These sections were passed in 1872, and we think should be considered in connection with section 701, which was passed in 1879, and sections 1936 and 2005, referred to in section 701.

If this be the correct reading of these sections of The Code, it would seem that while section 697 does say that these facts, *ipso facto*, dissolved the corporation, another corporation must be provided, as in section 1936 of The

Code, to take its place before it is dissolved; that there must always be a corporation in existence liable to the public for the duties and obligations assumed by the grantee for the privileges conferred in the grant of the franchise; and that the old corporation must continue to exist until this is done; and that when the new corporation is formed it will be a domestic corporation.

THE SECTIONS OF THE CODE REFERRED TO ABOVE AND CONSTRUED TOGETHER IN THE OPINION OF THE COURT, AS REQUIRING THE PURCHASER AT A FORECLOSURE SALE TO ORGANIZE A NEW NORTH CAROLINA CORPORATION, ARE AS FOLLOWS:

"Sec. 697. If a sale be made under a deed of trust or mortgage executed by any corporation on all its works and property, and there be a conveyance pursuant thereto, such sale and conveyent shall pass to the purchaser at the sale, not only the works and property of the corporation as they were at the time of making the deed of trust or mortgage, but any works which the corporation may after that time and before the sale have constructed, and all other property of which it may be possessed at the time of the sale other than debts due to it. Upon such conveyance to the purchaser, the said corporation shall *ipso facto* be dissolved, and the said purchaser shall forthwith be a new corporation by any name which may be set forth in the said conveyance, or in any writing signed by him recorded, in the same manner in which the conveyance shall be recorded.

"Sec. 698. The corporation created by, or in consequence of such sale and conveyance, shall succeed to all such franchise, rights and privileges, and perform all such duties as would have been, or should have been, performed by the first corporation, but for such sale and conveyance, save only that the corporation so created, shall not be entitled to the debts due to the first corporation, and shall not be liable for any debts of, or claims against, the first

corporation, which may not be expressly assumed in the contract of purchase; nor shall the property, franchise or profits of such new corporations be exempt from taxation. And that the whole profits of the business done by such corporations shall belong to the said purchaser and his assigns. His interest in the corporation shall be personal estate, and he or his assigns may create so many shares of stock therein as he or they may think proper, not exceeding the amount of the stock in the first corporation at the time of the sale, and assign the same in a book to be kept for that purpose. The said shares shall thereupon be on the footing of shares in joint stock companies generally, except only that the first meeting of the stockholders shall be held on such day and at such place as shall be fixed by the said purchaser, of which notice shall be published for two weeks in a newspaper. And when a corporation shall expire or be dissolved, or its corporate rights and privileges shall have ceased, all its works and property and debts due it shall be subject to the payment of debts due by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before, for the purpose of collecting debts due it, prosecuting rights under previous contracts with it, and enforcing its liabilities and distributing the proceeds of its works, property and debts among those entitled thereto.

"Sec. 701. This chapter, unless otherwise declared herein, or in the chapter entitled Railroads and Telegraphs, shall apply to all corporations, whether created by special act of Assembly, by letters of agreement under this chapter, or by the chapter entitled Railroads and Telegraphs. And this chapter and the chapter on Railroads and Telegraphs, so far as the same are applicable to railroad corporations, shall govern and control anything in the special act of Assembly to the contrary notwithstanding, unless in the act of the General Assembly creating the corporation the section or sections of this chapter, and of the chapter

entitled "Railroad and Telegraph Companies," intended to be repealed, shall be specially referred to by number, and as such specially repealed.

"Sec. 1936. There shall be a board of six directors and a president of every corporation formed under this chapter to manage its affairs; and said directors and president shall be chosen annually by a majority of the votes of the stockholders voting at such election, in such manner as may be prescribed in the by-laws of the corporation, and they may and shall continue in office until others are elected in their places. In the election of directors and president each stockholder shall be entitled to one vote personally or by proxy on every share held by him thirty days previous to any such election, and vacancies in the board of directors shall be filled in such manner as shall be prescribed by the by-laws of the corporation. The inspectors of the first election of directors shall be appointed by the board of directors named in the articles of association. No person shall be a director or president unless he shall be a stockholder owning stock absolutely in his own right and qualified to vote for directors at the election at which he shall be chosen; and at every election of directors the books and papers of such company shall be exhibited to the meeting if a majority of the stockholders present shall require it. And whenever the purchaser or purchasers of real estate, track and fixtures of any railroad corporation which has heretofore been sold or may be hereafter sold by virtue of any mortgage executed by such corporation or execution issued upon any judgment or decree of any Court shall acquire title to the same in the manner prescribed by law, such purchaser or purchasers may associate with him and them any number of persons, and make and acknowledge *and file articles of association as prescribed in this chapter; such purchaser or purchasers and their associates shall thereupon be a new corporation, with all the powers, privileges and franchise, and be subject to all the provisions of this chapter.*

"Sec. 2005. When any railroad corporation shall be dissolved, or its property sold and conveyed under any execution, deed of trust, mortgage or other conveyance, the owner or purchaser shall constitute a new corporation, and the property, franchise and profits of said new corporation shall be taxed as other like property, franchise and profits are taxed."

THE MORTGAGEES HAD CONSTRUCTIVE NOTICE OF PRIOR RULINGS OF THE SUPREME COURT.

At the October Term, 1883, nearly a year before the execution of the first mortgage bonds, on September 1, 1884, the Supreme Court of North Carolina said:

"The cases cited in the well-prepared brief of the plaintiff's counsel fully sustain the proposition that the defendant company, *leasing the use of its road, or permitting the use of it by another company*, remains liable for the consequences of the mismanagement of the train in charge of the servants of the latter, and the injury thence resulting, to the same extent as if such mismanagement was the act or neglect of its own servants operating its own train. Railroad v. Barron, 5 Wall., 90; Railroad v. Mayes, 15 Am. Rep., 678; Abbott v. Railroad, 36 Am. Rep., 572; Railroad v. Salvaint, 23 Am. Rep., 214; Pierce v. Railroad, *Ib.*, 283."

"On March 7, 1899, the Court filed its opinion in Pierce v. Railroad. The first paragraph of the opinion is as follows:

"Clark, J. The motion to dismiss the complaint and for judgment of nonsuit appears from brief of defendant's counsel to be intended to raise again the question whether the lessor company, the North Carolina Railroad Company, the defendant herein, is liable for all acts done by the lessee in the operation of the road, as was held in Logan v. Railroad, 116 N. C., 940, but why the counsel should feel encouraged to believe that this Court will retire from the position it has taken upon this question, we

are not advised. We have perceived no lack of soundness of reasoning therein. The decision in Logan's case was made after full deliberation and with full appreciation and careful discussion of the important principles now again called in question, and it was held that *a railroad company can not escape its responsibility for negligence by leasing its road to another company, unless its charter or a subsequent act* of the Legislature specially exempts it from liability in such case, and it was made in an action to which the appellant herein was the party raising the question. The same proposition has been theretofore laid down by Smith, C. J., in Aycock v. Railroad, 89 N. C., at page 330, with cases there cited, and Logan's case upon this point has been expressly cited and sustained in Tillet v. Railroad, 118 N. C., at page 1043; James v. Railroad, 121 N. C., page 528; Benton v. Railroad, 122 N. C., 1007 (decided May 24, last), and Norton v. Railroad, same volume, at pages 936, 937. In the last two cases this point was again held against the same corporation, which is the appellant in this case; the verdicts were for considerable sums, and in Norton's case the defendant was represented by the same counsel as in the present case."

DOCTRINE NOT PECULIAR TO NORTH CAROLINA.

The principle that a railroad corporation on acceptance of its charter (which was done in our case in the year 1855), enters into a contract with the sovereign, granting the charter to furnish reasonably safe carriage for passengers and to its employees, was announced by Chief Justice Shaw, in the case of McElroy v. Nashua, etc., R. Co., 4 Cush., 400, and repeatedly received the sanction of the Supreme Court of the United States, and of leading Courts of the different States.

Railroad v. Barron, 5 Wall., 90, 104.
Thomas v. Railroad, 101 U. S., 83.
Nelson v. Vermont, etc., R. Co., 26 Vt., 717.

The Chicago, etc., R. Co., v. McCarthy, 20 Ill., 385.
Ohio, etc., R. Co., v. Dunbar, 20 Ill., 623.
Chicago, etc., R. Co., v. Whipple, 22 Ill., 105.
35 Am. St. Rep., 302, and notes.

The learned Chief Justice, in McElroy v. Railroad, *supra*, took the ground that where the personal action was brought for damages for killing a decedent by a personal representative, the plaintiff had his election to sue for a tort or to bring his action for the breach of contract, upon the idea that its benefits inured to the passengers as well as to the State.

In Railroad v. Winans, 17 How. (58 U. S.), 30, the Court said, in discussing the question of the power of a corporation to rid itself of its obligation to the State, which created it:

"This conclusion implies that the duties imposed upon the plaintiff by the charter are fulfilled by the construction of the road, and that by alienating its right to use and its powers of control and supervision, it may avoid further responsibility. But those acts involve an overturn of the relations which the charter has arranged between the corporation and the community. Important franchise were conferred upon the corporation to enable it to provide the facilities to communication and intercourse required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their inefficiency provided as a remuneration to the community for their grant. The corporation can not absolve itself from its obligations without the consent of the Legislature. Beman v. Buford, 1 Simon N. S., 550; Minch v. B. and L. Railway Co., 13 L. and E., 506; James v. Railroad Co., 121 N. C., at page 529."

The "Southern" had notice of these statutes quoted above and of the State construction of them when it bought in 1893, as the bondholders had in 1884, and is pre-

sumed to have known that is was necessary to form a domestic corporation under the State statutes in force before the bonds were issued, the plan of reorganizing under a new charter having been previously approved in Gooch v. McGee, 83 N. C., 664, and in Kendrick v. Railroad, 101 N. C., 620; Bass v. Nav. Co., 111 N. C., 446; Von Glahn v. Derossett, 81 N. C., 467.

THE FEDERAL COURTS SHOULD BE GOVERNED BY THE DECISIONS OF THE STATE COURT.

The decision in Aycock v. Railroad, *supra*, rendered in 1883 (before the mortgages were executed), followed by the series of adjudication already cited, should, according to the current of authority, be followed by the Federal Court.

"It is undoubtedly a question of local policy with each State what should be the extent and character of the powers which the various political and municipal organizations shall possess, and the settled decision of the highest Court on this subject will be regarded as authority by the Courts of the United States, for it is a question that relates to the internal constitution of the body politic of the State."

Claiborne v. Brooks, 111 U. S., 410.
Fall Brook Irrig. Dist. v. Bradley, 164 U. S., 112.
Leeper v. Texas.

If this exception is intended to raise the question of liability of the lessor, we can only repeat what we said before, "That a railroad company leasing its road is liable for the negligence of its lessee in the operation of the road, is well settled in this State." Aycock v. Railroad, 89 N. C., 321, 330; Logan v. Railroad, 116 N. C., 940; Tillett v. Railroad, 118 N. C., 1031, 1043; James v. Railroad, 121 N. C., 523, 528; Benton v. Railroad, 122 N. C., 1007, 1009; Norton v. Railroad, 122 N. C., 910, 937; Pierce v. Rail-

road, 124 N. C., 83, 93; Perry v. Railroad, 128 N. C., 471, 473; Raleigh v. Railroad and Harden v. Railroad, at this term.

Perry v. Railroad, 129 N. C., at page 332.

The Supreme Court of North Carolina had not had the authority to construe its own Constitution and laws, free from the right of review, except by writ of errors in certain cases, and its rulings were entitled to respect on the part of the Federal Court.

In Aycock v. Railroad, at the October Term, 1883, nearly a year before the first or second mortgage bonds were executed in September, 1884, the Supreme Court of North Carolina had held, that a railroad company *permitting another company to use its road*, was responsible for the negligence of the latter resulting in death or injury to passengers.

In James v. Railroad, the Court held that the Southern Railway Company, a corporation of Virginia, as such could not own the franchise of a railroad company incorporated by the State of North Carolina without the express consent of the State, which had not been given; second, that the statutes authorizing the mortgage construed, with other statutes in force when the mortgages were executed, required that a purchaser at a foreclosure sale should proceed to organize a domestic corporation, and until such purchaser so organized, it would operate the railway, by consent of the mortgagor, and would occupy the same position as a lessee or licensee, and, that it was settled law in North Carolina that a domestic railroad corporation could not absolve itself from liability for the culpable negligence of a foreign company, operating its road as a lessee, except by the express assent of the State of North Carolina to such execution.

In Harden v. Railroad, 129 N. C., at page 359.

Logan v. Railroad, *supra*, has been cited and approved

on this point. Tillett v. Railroad, 118 N. C., at page 1043; James v. Railroad, 121 N. C., 528; Norton v. Railroad, 122 N. C., at page 937; Benton v. Railroad, *Ibid.*, at page 1009; Pierce v. Railroad, 124 N. C., at page 93; Perry v. Railroad, 128 N. C., at page 473, and in Raleigh v. Railroad, at this term, in most of which cases this defendant was a party.

In 20 Am. and Eng. R. R. Cases, Annotated, at page 847, the rule is laid down: "A railroad company which has leased its road, cars and engines, and allows the lessee company to operate the same, is liable to third persons or the public for the carelessness and negligence of the lessee, and for defects in the construction and maintenance of the road and its equipments, unless there is a statutory provision to the contrary" (and there is none in this case). For this proposition it there cites thirty-six cases from the United States Courts and the Courts of the different States, and from England, and it is not necessary to repeat them here. In Railroad v. Brown, 84 U. S., at page 450, the Court says: "It is accepted doctrine in this country that a railroad corporation can not escape the performance of any duty or obligation imposed by its charter or the general laws of the State by a voluntary surrender of its road into the hands of lessees. The operation of the road by the lessee does not change the relations of the original company to the public," and cites with approval Redf. Railways to same effect. Also the same purport are I Beach Pr. Corp., sec. 366; I Spelling Pr. Corp., 145, and several other authorities cited in Logan v. Railroad, 116 N. C., at page 946, *et seq.*

The petitioners deny the authority of the Federal Court:

First. To grant the corporation.

Second. To review and reverse the ruling of the State Court instead of following constructions of the State laws made before the mortgage debts were enacted.

Third. To declare unjust and oppressive the statutes of

North Carolina in reference to selling the franchise and property of railroad company, that had been enacted many decades before the mortgage debts was enacted, and which had been re-enacted as a part of The Code in 1883, a year before the date of the mortgages. (See record, page 204.)

A. C. AVERY,
LEE S. OVERMAN,
C. A. MOUNTJOY,
Counsel for Petitioners.

EDWARDS & BROUGHTON, PRINTERS AND BINDERS, RALEIGH.

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Supreme Court of the United States

OCTOBER TERM, 1902.

No. 457.

DAVID R. JULIAN, SHERIFF; MRS. CLEMYE JAMES, ADMINISTRATRIX OF W. A. JAMES, AND MRS. FANNIE HOWARD, ADMINISTRATRIX OF JOHN H. A. HOWARD, PETITIONERS,

vs.

THE CENTRAL TRUST COMPANY, OF NEW YORK, AND SOUTHERN RAILWAY COMPANY, RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI.

BRIEF OF CHARLES PRICE, SOLICITOR FOR RESPONDENTS, OPPOSING GRANTING WRIT OF CERTIORARI.

We submit, this is a case, in which, the writ of certiorari, should not issue; and, in support of this contention, it is to be observed, that, on the 5th of October, 1901, the Sheriff of Rowan County, North Carolina, David R. Julian, was enjoined, from seizing the Western North Carolina Railroad, over 250 miles, in length, and delivering the same, after

sale, *immediately*, to the purchaser, under section 674, of the Code of North Carolina, in satisfaction of two judgments, one, in the sum of $15,000; and, another, $5,000, recovered, as set out in the bill, printed in the record, page 53.

The injunction was issued upon the bill, supplemental, to the original bill, to foreclose a mortgage, executed to the Central Trust Company, of New York, printed in the record, page 90.

As we say, this is a supplemental bill, or may be treated as an original bill, to remove a cloud from the title, cast upon property, bought by Southern Railway Company, at foreclosure sale, by decree of Circuit Court. Page 53, Record.

It is also a bill, to protect Southern Railway Company, in enjoyment of property, bought, under decree of foreclosure, and sale.

As to the jurisdiction, see *Root* vs. *Woolworth*, 150 U. S. R., page 401.

"The bill, being ancillary to the original proceeding" * * * "and supplementary to the decree rendered therein, can be maintained, without reference to the citizenship, or residence of the parties." Page 413, 150 U. S. R., *Ibid.*

It is only in equity, that adequate relief can be had, in this proceeding; because, 1st, irreparable damage would be done, unless the officer was restrained from "*seizure of the property*" as he is *required* by the Code of North Carolina, to do. See section 674, of the Code of North Carolina. This section provides, that the officer shall, "*immediately* after such sale, deliver to the purchaser possession *of all the corporate real property connected with the franchise*," &c. See notice of sale, printed in the bill, where respondent says, he will "sell agreeably to law," this property. See printed bill, p. 53.

Equity jurisdiction, also, is invoked in this case, to prevent a multiplicity of suits. There are other judgments

against this old company, similar to those of James and Howard, and others. And, also, other actions, pending in this district against the Western North Carolina Railroad Company. See transcripts. *Wehrman* vs. *Conklin*, 155 U. S. R., 314. Pages 17, &c., of Record. In *Central Trust Company, of New York*, vs. *W. N. C. R. R. Co.*, 89 Fed. Reporter, page 24, Judge Simonton shows, the jurisdiction of the court, and, that section 720 of Revised Statutes is not involved.

On page 124 of the printed record, as a part of the decree of confirmation of sale, is the following: "It is further ordered and decreed," that the Special Master make a deed to Southern Railway Company, conveying this "*railroad* and *property, franchise*, etc.," "*free from any and all equity of redemption, of the said Western N. C. R. R. Co., or, any one, claiming, by, under, or through it*," except the prior mortgage, recited in the decree. This makes the Southern Railway Co. "*the absolute owner thereof.*" The owner of what? "*All and singular the railroad, equipment, property, and franchises, so, as aforesaid, sold* under the decree of this court." It is a sale and transfer of the *railroad and franchise;* not the *estate* of the Western N. C. R. R. Co., alone, but "the *property* and *franchises*," themselves.

In the last paragraph of the same, there is a *further assurance*, proviso.

So that two years, before James and Howard were killed, under these decrees, deed &c., the Southern Railway Co., was the "*absolute owner*" [illegible] property, and franchises.

The W. N. C. R. R. Co., had no possible interest or estate, in the *railroad*, or *franchises*, so sold.

There is no lien law in North Carolina, that gave Mrs. James, and Mrs. Howard, a lien upon a thing, the defendant, the W. N. C. R. R. Co., *did not have, at the time of the origin of their claims, the deaths of deceased.*

Then we see, they are cut off, because the decree, on page 55, says: *free from all and every equity of redemption* of the

said W. N. C. R. R. Co., "*or any one claiming by, under, or through, it.*"

These people certainly claim "*by, under, and through,* The W. N. C. R. R. Co.," *because their judgments were obtained on account of something done, by the Western N. C. R. R. Co., as alleged, more than two years after the sale, under foreclosure.*"

Then, this is as much foreclosed, as the rights of stockholders. "The judgment of foreclosure is conclusive, against the stockholders," *and against anything, that the W. N. C. R. R. Co. could do, or, any right claimed, by any one, on account of anything, done by the W. N. C. R. R. Co. after sale.* See Judge Simonton's opinion, page 29 Fed. Rep., Vol. 89.

See *deed of master,* as to *what was conveyed under these decrees, &c.*

In addition to authorities cited by Judge Simonton, see *Farmers' Loan & Trust Co.* vs. *Lake St. R. R. Co.*, page 51, 177 U. S. R., and, especially, pages 61 and 62. *Hancock National Bank* vs. *Foreman*, page 641, 176 U. S. Rep.

It is well settled, that, for a sheriff to make, an "*excessive levy*" is actionable, by a defendant, in the execution. Sec. 773, Mecham on Public Officers. "*It cannot be tolerated,*" says, Cooley, Justice, "*that such a seizure shall go unrebuked.*" *Handy* vs. *Clifford*, 50 Mich., 355.

Here was *five millions of property levied on, and notice of purpose to seize* "*the entire property, corporate real,*" and deliver to the purchaser *immediately* after sale. See page 4, of bill. Also, section, in bill, *infra.*

A court of equity, is the only court, that *can* give adequate relief, in a case of this kind.

In this argument, we beg the Court to note the most *important fact,* that the Southern Railway Company, a Virginia corporation, *purchased* the Western North Carolina Railroad, and *franchises of the corporation,* and all of its other property, at a foreclosure sale, under a second mortgage, subject to a lien of the first mortgage, the Central Trust

Company of New York, being trustee, in *both* mortgages. This purchase was in fee.

This sale was duly confirmed, on the 22nd day of August, 1894. See full decree, on page 123, of the record. See deed, of Master, page 154, of record.

Under this decree, and by virtue of the deed, of the Master, it is to be observed, the Southern Railway Company, became the absolute owner of the property, and franchises, of the corporation, sold; and, was in *sole possession* of the railroad, and franchises of the old company, and had been operating *the road for over two years, as sole owners, before the disaster*, out of which, resulted the death of James, the intestate of the respondent James, Admx.; and, of Howard, also.

The Western North Carolina Railroad Company, the old corporation, *at that time, had no interest, no estate of any kind or character*, in the franchise; or, any other property of that old corporation, which had been sold, and purchased, by the Southern Railway Company.

In the action brought by the Admx. in the superior court of Rowan county, the State court, that is to say, the James case, the Southern Railway Company, was not a party. The action was tried with James, Admx., as sole plaintiff, and the Western North Carolina Railroad Company, *sole* defendant, same as to Howard.

The contention on the part of the plaintiff, was, that the railroad was being operated by a lessee, under a valid lease, made by authority of law, and, that the lessee, that is to say, the Western North Carolina Railroad Company, was liable to plaintiff for the death of intestate, an engineer, the same caused by the negligence of the lessee, which lessee was in sole possession of, and solely operating, the railroad.

The contention of the defendant, that is to say, the Western North Carolina Railroad Company, was, that the old corporation was dissolved, for all purposes, but one, and that one was, its existence for three years, in which to wind up its affairs, the time fixed by statute. In addition to this, it was

contended that the death of the intestate was caused by the negligence of a fellow-servant, to wit: the engineer in charge of the locomotive coming in collision, with the one driven by plaintiff's intestate. The trial court, the Superior Court, held that the old corporation was dissolved by the sale and conveyance made by the master, as provided in sec. 697, of the Code of North Carolina, and gave judgment for the defendant. From this judgment, the plaintiff appealed to the Supreme Court, which court overruled the court below, and directed that judgment be entered against the defendant, for the amount of the verdict, which was in favor of the plaintiff, upon the question of negligence.

The sole question, presented by the record, to the Supreme Court, upon appeal, was whether the corporation was dissolved. The Court held it was not, and affirmed the judgment.

Sec. 697 provided, that, upon a sale of a corporation's property, like this, under foreclosure, or trust, the purchaser, *ipso facto*, by the sale, and conveyance, became a corporation.

It is, as follows:

"SEC. 697. If a sale be made under a deed of trust or mortgage executed by any corporation on all its works and property, and there be a conveyance pursuant thereto, such sale and conveyance shall pass to the purchaser at the sale, not only the works and property of the corporation as they were at the time of making the deed of trust or mortgage, but any works which the corporation may after that time, and before the sale, have constructed, and all other property of which it may be possessed at the time of the sale other than debts due to it. Upon such conveyance to the purchaser, the said corporation shall *ipso facto* be dissolved, and the said purchaser shall forthwith be a new corporation by any name which may be set forth in the said conveyance, or in any writing signed by him and recorded, in the same manner in which the conveyance be recorded."

This is a familiar statute, and was never construed, elsewhere, as in North Carolina.

There must be some one, to take the place of the old corporation.

It is admitted, the Southern Railway Company, purchased the equity of redemption, at the foreclosure sale. Having done this, what, may we ask, estate, had the Western North Carolina Railroad Company, in the property, franchises, &c.?

The only estate of the old corporation, in the same, that is to say, in the *railroad*, and *franchises of the Company, was an equity of redemption*, which was sold, and bought by the Southern Railway Company.

Then, at the time of the killing of James and Howard, admittedly, employés of the Southern Railway Company, the Western North Carolina Railroad Company, *had no property, of any kind, or character.* Nor, indeed, *had the Company, had, for more than two years.*

James and Howard, were *not employed*, by the Western North Carolina Railroad Company, and *never had been.* They were servants of the Southern Railway Co., and employed, by that Company, to operate one of its engines, being driven, on the railroad, purchased, under the decree of foreclosure, and sale, entered in the Circuit Court of the United States, in May, 1894.

Section 697 of the Code, was enacted, for the purpose of supplying a corporation, to take the place of the one, whose property was sold, which sale was supposed to have dissolved the old Company.

There must be some one, to whom the State can look, for performance of the duties imposed by the sovereign, as a consideration for granting the franchise.

This is true, and, as the lord paramount, under the feudal system, looked to the freeholder for the performance of the feudal services, so does the sovereign, now look, to the holder of the franchise, for the performance of the duties imposed, when it was granted. It looks, we may say, to the franchise itself, and in doing so, this performance is, by the person

owning the franchise, as in this case, the Southern Railway Company.

This is a North Carolina franchise, owned by a person, of another State. The Southern Railway Company is a corporation, operating a railroad, under and by reason of the franchise, purchased, at the sale of the Western North Carolina R. R., under the decree of foreclosure and sale, passed by the circuit court of the United States, as disclosed by the record, in this suit.

The Southern Railway Company operates the *North Carolina Railroad*, the property of *another* company, in North Carolina, but only by reason of the *ownership of the franchise of that company, for a term of years.* But for this, it could not operate it; and, but for *its ownership absolute, of the franchise of the old W. N. C. R. Co.*, it could not operate *it.* When the sovereign power grants a railroad charter, or, we may say, *any* charter, it does two things: It brings a person, a corporation, into existence; and then confers upon it, certain rights privileges, sometimes, called liberties, but, always, franchises. With the permission of the sovereign, the corporation may dispose of its franchises, as it may, of any of its other property. But it cannot dispose of *itself.* So when the Western North Carolina Railroad Company, executed the 1st and 2nd mortgages, the 2nd, being a mortgage of its *equity of redemption*, and all the property, including its franchises, and there having been a foreclosure and sale, under that 2nd mortgage, so far as *property was concerned*, the corporation had none left. In the face of this, it is contended, that, in satisfaction of a judgment, obtained in the State court, three years after the corporation had *lost all its property*, including its franchises, upon *an alleged cause of action*, which did not *arise until two years after the purchase of this property* and franchise, the *same property and franchises*, can be taken, by a process, issuing from the State court.

Justice Matthews, on page 619, Vol. 112, U. S. Reports, in the case of *Memphis R. R. Co.* vs. *Commissioners*, says:

"The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders, or the purchasers at a foreclosure sale, the substantial rights intended to be secured. They acquire the ownership of the railroad and the property incident to it, and the franchise of maintaining and operating it as such; and the corporate existence is not essential to its use and enjoyment. All the franchises necessary or important to the beneficial use of the railroad could as well be exercised by natural persons. The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the corporators, while the powers and privileges, vested in and to be exercised by the corporate body as such, are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence, after the corporation has parted with all its property and all its franchises."

Cook on Corporations, pages 1798 and 2130. See cited cases by this author on same pages. Pages numbered at bottom.

In the petition, and brief, some importance is attached to the fact, that A. B. Andrews, verified the answer, in the actions for negligence, prosecuted in the State court. This was on account of section 667, of the Code of North Carolina, which gave to the old Company, three (3) years' time, to wind up the business of the dissolved corporation. A. B. Andrews was the president of the Company, before foreclosure sale.

At this point, we may further observe, that the petitioners insist, the Southern Railway Company, a Virginia corporation, could not purchase the franchise of the Western North Carolina Railroad Company, at the foreclosure sale, without express permission of the sovereign.

It is not denied, that the Western North Carolina Railroad Company had the right, the power, to mortgage its property, *including its franchise.* Under the laws of North Carolina, and its charter, the corporation was empowered

to place as many mortages, upon the same, as it saw fit. This being so, it is "obvious that legislative authority to mortgage the franchises of a corporation, carries with it an implied authority to make the mortgage *effective by bringing those franchises to a sale, and transferring them*, with the *tangible* property of the corporation, to the purchaser." 35 Amer. State Reports, page 398, note 2, citing *New Orleans, &c., R. R. Co.* vs. *Delamore*, 114 U. S., 501.

This being so, who could purchase? Any person could, not prohibited from doing so, by some law. Indeed, if any person or corporation in North Carolina could purchase, so could any person or corporation, of another State. It is not denied that the Southern Railway Company is capable of holding this property under a *lease*. The Supreme Court of North Carolina, in the *Logan Case*, 116 N. C., has so decided. This is so by reason of the power conferred upon the lessor corporation, to lease its property. It would not be a valid lease, however, unless the lessee was authorized to take the property under the lease. Out of what does this authority grow, or come? First, because the Virginia charter conferred upon the lessee the power to take; and, second, because of the laws of comity between the States. There is nothing in the laws of North Carolina which forbids, the purchase of the property, by a Virginia corporation. The Southern Railway Company had the power to take under the lease. It has the power to purchase. A corporation created by one State can transact business in another State, by consent of the latter. That consent may be either express or implied. When implied, it is under the laws of comity. In this case, there being nothing to forbid the carrying on the business of the foreign corporation, in the laws of North Carolina, its consent is implied. The business of the foreign corporation, is that expressed in its charter; amongst other things and powers enumerated, in the same, is the one of authority to purchase, and operate, railroads in other States. Under this power, so conferred, by the State, creating the

Southern Railway corporation, and by reason of this consent, so implied, by the State of North Carolina, even in the absence of any provision, in its laws, concerning the same, it has the power to purchase, and under that power, regardless, as we say, of the express power granted by the sections of the Code, cited, in the opinion of the Circuit Judge, did purchase, the franchise and other property, of the old corporation, as we have before shown.

Lafayette Ins. Co. vs. *French*, 18 How., 400, 407.

Any citizen, any *individual*, had the right to purchase this property, at the foreclosure sale, whether a resident of this, or any other State.

New Orleans, &c., vs. *Delamore*, Vol. 114, page 508, U. S. Reports.

Memphis Railroad Co. vs. Commissioners, 112, U. S. Rep. 619.

Barcello vs. Hapgood, 118 N. Car. Rep., 728–729.

This is a matter, however, *only to be enquired into by the State. Ibid.*

Under the laws of North Carolina, a corporation can sell, transfer, or mortgage its franchises, except, *that*, to be, and exist, as a corporation. Code of N. Car., sections 671, 673, 675.

With regard to the purchase, the word, person, is used; and, corporation is a person, under the Fourteenth Amendment.

"In the case of *Gulf, Colorado and Santa Fe Ry. Co.* vs. *Ellis*, 165 U. S. R., page 150, Mr. Justice Brewer, says: 'It is well settled that corporations are persons within the provisions of the fourteenth amendment of the Constitution of the United States. *Santa Clara County* vs. *So. Pac. R.*, 118 U. S., 394; *Pembina Mining Co.* vs. *Penn.*, 125 U. S., 181, 189; *Missouri Pac. R.* vs. *Mackey*, 127 U. S., 205; *Minn. & St. Louis Ry.* vs. *Herricks*, 127 U. S., 210; *Minn. & St. Louis Ry.* vs. *Beckwith*, 129 U. S., 26; *Charlotte & Columbia R. R.* vs.

Gibbes, 142 U. S., 386; *Covington & Lexington Turnpike Co.* vs. *Sandford*, 164 U. S., 578. The rights and securities guaranteed to persons, by that instrument, cannot be disregarded, in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations, the equal protection of the law, than it has to individual citizens.'"

The following is paragraph four, subsection (*a*) of the Charter of the Southern Railway Company, granted by the State of Virginia, on the 20th of February, 1894. Acts of Assembly of Virginia, 1893–'94, Chap. 302, p. 368:

4. In addition to its other powers, such new corporation, shall have, and from time to time, as occasion arises, may exercise, the following powers, or any of them, namely:

(*a*.) With the approval of a majority of its stockholders, given at a meeting, it may, from time to time, lease, use, operate, consolidate with, or purchase, or otherwise acquire, or be leased, used, operated by, or consolidated with, any railroad or transportation company, now or hereafter incorporated by the laws of the United States, or of any of the States, thereof, or any one or more of such railroad or transportation companies, or any other railroad or transportation company or companies, which now are, or hereafter may be, leased, or used, or operated by, or consolidated with, any one or more, of such railroad or transportation companies.

We call the attention of the Court to an able, and elaborate, discussion of this subject, including the jurisdiction, in a former opinion of Judge Simonton, in a case, similar to this, Central Trust Company *vs.* Western North Carolina Railroad Company, 89 Fed. Rep., 24, 25, &c.

To say that the State lost its right of visitation and enforcement of forfeiture, for misuser and non-user, by reason of the purchase of the franchise and property of the Western

North Carolina Railroad Corporation by the Southern Railway Company, is to fail to distinguish between the body corporate, and its property, a part of which, is its *franchise*. The sovereign exercises its right of visitation, and enforcement of forfeitures, upon the *franchise*, and upon the person, owning the franchise, whether that person be a corporation, or a natural person.

In this case, the Southern Railway Company, is the owner of the franchise, as it is of the railroad track, and cars, that run upon the track.

There can be no intelligent appreciation of the principles involved in this case, as long as, the well-defined distinction between the *franchise*, and the *corporation* is not observed.

"Laws allowing the purchasers at a foreclosure sale to form a new corporation, are not intended to prevent a sale or transfer to a corporation *already formed*, and *capable, under the laws of its creation*, of holding the corporate property and exercising the franchises, which pass to the purchaser by sale: *People* vs. *Brooklyn, &c., Ry. Co.*, 87 N. Y., 75."
35 American State Reports, page 400, note.

As to the effect of permission, under the laws of comity, given a foreign corporation to do business in another State than that of its creation, &c., see *Conn* vs. *Chicago B. & Q. R. Co.*, 48 Fed. Reporter, page 177.

It is said, the order of the Circuit Court, prohibits the *issuing of execution* upon the judgment, against the Western North Carolina Railroad Company.

We do not so understand the decree. What the decree does, is, *to enjoin any interference with the property and franchises* of the Western North Carolina Railroad Company, *purchased* by the complainant, the Southern Railway Company, at the foreclosure sale. The *issue of execution*, is not enjoined. It is the *abuse of process*, that is enjoined.

The actions prosecuted in the State court, by James, Admx., and Howard, Admx., against the Western North Carolina

Railroad Company, growing out of the same disaster, in November, 1896, more than two years after the conveyance, to the Southern Railway Company, of all the property of the Western North Carolina Railroad Company, including all franchises of the corporation, under the foreclosure suits, in the year, 1894, were based upon the alleged negligence of the Southern Railway Company, the said purchaser, as alleged, operating the road as lessee, or agent.

The defense set up by its president, it being within the three years, allowed to wind up its business, was, *first*, a denial of the negligence; second, that the engineer's negligence, causing the injury and death of James and Howard, was that of a fellow-servant, and third, the fact that the corporation sued, was dissolved, by Section 697 of the Code.

The only point presented, by the record, in the Supreme Court, however, was the fact, that the Western North Carolina Railroad Company was dissolved. The Judge on the Circuit, had so decided. In this, he was reversed. No evidence of any lease was offered; nor, at the trial, was it suggested that there was any fraud in the sale. It was conceded, that the foreclosure proceeding was regular. Now, here was a statute construed, section 697, set out in this brief, by the Court, two years after the Southern Railway Company had purchased the property, to mean, that, before the old corporation became dissolved, there must be a new corporation supplied to take the place of the old. While this statute expressly provides, that, the sale and conveyance, *ipso facto, dissolved* the corporation, and the *purchaser* became a *new corporation*, the Court held it was not.

In the first place, we contend, that when an already organized corporation becomes the purchaser, at such sale, it is not necessary to supply another. *People* vs. *Brooklyn, etc., Ry. Co., 87 New York; 75 35th American State Reports, 400, and note.*

In a case of this kind, the statute does not apply.

So, that, really, the decision in the 121 N. Car. Rep., can have no bearing upon this case.

It *is plain to be seen*, that the *real purpose*, in prosecuting these actions against the *old, dissolved* company, was, to *avoid a removal of the same to the United States Circuit Court.*

Indeed, after the actions were tried, other suits, by the same plaintiffs, for the *same cause of action*, were begun, and *stand now, for trial*, in the said Court. There was no pretense that the Southern Railway Company was, or, is, insolvent.

The case of Railroad *vs.* Burnett, 123d N. Car. R., cited in petitioner's brief, can have no bearing upon this case, for the reason, that when the corporation's property and franchises were sold out, under the foreclosure proceeding, and bought by the Southern Railway Company, it was two years and three months *before the disaster*, out of which the actions for the death of James and Howard arose. In the Burnett case, the purchaser took with notice of the *plaintiff's claim*, although it had not been reduced to judgment, whereas, in the case at bar, there *was no claim*, as there could not be a *judgment*, at the time of the foreclosure sale; because, these men, servants of the Southern Railway Company, were not *killed*, until two years after the sale, as we have said, several times, in this brief.

The abuse of this process, the executions, issued by the Superior Court of the County of Rowan, the State court, consisted, as set out, in the bills, of an attempt to *seize the property, conveyed*, the Western North Carolina Railroad, and the *franchises of the corporation*, sold to complainant, by, and under, the decrees of the Circuit Court; and, in the sole, and exclusive use and occupation of the Southern Railway Company, which had been solely operating the same, more than two years, *before* the alleged negligent killing of James and Howard, as its own property.

The seizure of this property, and sale of the same, by this sheriff, is in contempt, and defiance, of the decrees of the court, solemnly entered.

This action of the sheriff, in attempting to sell this prop-

erty, as set out in the bill, printed in the record, is in violation of the laws of comity, between the courts of sovereigns.

The well known rule is, that, " in cases of persons who, or, of property, which, may be subject to the jurisdiction of the courts, of the States, or, of the United States, *that* jurisdiction, which *first actually attaches*, either to the person, or property, *will retain control*. It cannot be divested, by process issued from the other jurisdiction."

Covell vs *Heyman*, 111 U. S. R., page 182. In this case, Matthews, Justice, said :

" The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with, perhaps, no higher sanction than the utility which comes from concord ; but between State courts, and those of the United States, it is something more. It is a principle of right and of law, and, therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent ; and although they coexist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane ; and when one takes into its jurisdiction a specific thing, that *res*, is as much withdrawn, from the judicial power of the other, as if it had been carried physically, into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the court from which it issues."

Nothing can be found in the decisions of the Supreme Court of the United States, different from what Justice Matthews has said, in this case. There are a great many cases, which support the rule contended for.

Section 720 of the Revised Statutes has no relation to this case. It is not the process that is enjoined, but its abuse ; the injunction, protects the property of respondent.

When the bill for foreclosure was filed, in April, 1894, (Record, page 90) in the Circuit Court of the United States the *suit was begun*, and the Court asserted its jurisdiction over this property. It was then, *after the issue of process*, that the *res* was taken into the possession of the Court, "with power to hear and determine all controversies, relating thereto," as said by Justice Shiras, in the case of Farmers' Loan & Trust Co. *vs.* Lake St. Rd., 177 U. S., 61.

It is "to prevent unseemly conflicts, between courts, whose jurisdiction embraces the same subjects and persons." *Ibid.*

In Rodgers *vs.* Pitt, 96 Fed. Rep., 668, will be found cited, many cases, in support of this principle.

We call the attention of the Court, to the opinion of Judge Boyd, in this suit, on the Circuit, 112 Fed. Rep., 471, printed, in the record: and, also, to that of Judge Simonton, affirming the decree, speaking, for Circuit Court of Appeals. 115 Fed. Rep., 956, also in the record.

In addition to the foregoing, we print below, the brief, containing the substance of our argument, before Circuit Court of Appeals, at the hearing of this suit, February Term, 1902, in Richmond.

BRIEF FOR APPELLEES.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT. IN EQUITY.

DAVID R. JULIAN, *Sheriff;* MRS. CLEMYE JAMES, and FANNIE E. HOWARD, *Appellants,*
versus
THE CENTRAL TRUST COMPANY OF NEW YORK and SOUTHERN RAILWAY COMPANY, *Appellees.*
No. 438.

Brief of Charles Price, Solicitor for Appellees.

In answer to the brief of defendant's counsel, filed in the above entitled cause, we submit the following:

There was a foreclosure suit, prosecuted in the Circuit Court of the United States, Western District of North Carolina, the purpose of which was to foreclose a second mortgage, executed by the Western North Carolina Railroad Company, to the Central Trust Company of New York, trustee, of the date of the 2nd of September, 1884.

There was a decree of foreclosure and sale, duly entered in said suit May 2nd, 1894, and filed in the office of the clerk, at Statesville, May 5th, 1894.

This decree of foreclosure and sale so entered and filed, as aforesaid, in May, 1894, provides, amongst other things, as follows:

"The purchaser or purchasers of this property herein decreed to be sold," the Western North Carolina Railroad and its franchises, "shall be invested with and shall hold, possess and enjoy the said mortgaged premises and property herein decreed to be sold, and all the rights, privileges and franchises appertaining thereto, as fully and completely as the Western North Carolina Railroad now holds and enjoys, or has heretofore held and enjoyed the same; and further, the said purchaser or purchasers," and in this case, the Southern Railway Company, "shall have and be entitled to hold the

said railroad and property discharged of and from the lien of the mortgage foreclosed, in this suit, and from the claims of the *parties to this suit or any of them*, except the first consolidated mortgage of September 1st, 1884." See record in former suit, page 43.

After this decree of sale the property, that is to say, the Western North Carolina Railroad and its franchises, were sold in pursuance of the same, when the Southern Railway Company, a corporation originally created, in the State of Virginia, and doing business in the State of North Carolina, duly authorized to do so, became the purchaser. On the 22nd day of August, 1894, as appears on page 53 of the record, in the former suit, there was a decree of confirmation of sale, duly entered in the circuit court of the United States, which provides, amongst other things, as follows:

"It is further ordered and decreed that the special master is hereby authorized and directed, on the request of said purchaser, to sign, seal, execute, acknowledge and deliver a proper deed of conveyance to the said Southern Railway Company, conveying to it all and singular the railroad, equipment, property and *franchises* so as aforesaid sold under the decree of this court, free from any and all equity of redemption of the said Western North Carolina Railroad Company, *or any one claiming by, under or through it, except the prior mortgages recited in such decree.* Upon the delivery of such conveyance by the special master the said *Southern Railway Company shall fully possess, and be invested with all of the estate, right, title and interest in, to and of such railroad, equipment, property and franchises so sold under the decree of this court as the absolute owner thereof, to have and hold the same to it and its successors and assigns forever.* In order to facilitate the recording thereof, four counterparts, of such deeds may be executed, acknowledged and delivered by the special master, all or any one or more of which may be recorded, and any one or more of such counterparts, when executed, acknowledged and delivered, shall severally or collectively be deemed to be an original, and for all intents and purposes constitute a single instrument.

"On August 31st, 1894, on exhibition of the deed executed

and delivered by the special master herein ordered, the defendant company is authorized, directed and required forthwith to deliver over to the said Southern Railway Company the possession of all and singular the railroad and property described in and conveyed by such deed.

"It is also further ordered that by way of further assurance and confirmation of title to such Southern Railway Company of the property so by it purchased under the decree of this court, the said the Western North Carolina Railroad Company, by its proper officers and under its corporate seal, and the Central Trust Company of New York, trustee, shall, upon request of said Southern Railway Company, sign, seal, execute, acknowledge and deliver to said Southern Railway Company all proper deeds of conveyance, transfer, release and further assurance of all the railroad, property and franchises so as aforesaid sold under the decree of this court and embraced in the deed of the special master, so as fully and completely to transfer to and invest in the said Southern Railway Company the full, legal and equitable title to all such railroad, property and franchises sold or intended to be sold under the decree of this court."

In pursuance of the decree, so as aforesaid, duly entered, there was a deed executed and delivered by the special master, to the purchaser, the Southern Railway Company, complainant, on the 22nd of August, 1894, conveying to the purchaser, the property, as follows:

"All and singular the railroad of the said Western North Carolina Railroad Company in the State of North Carolina, extending from Salisbury, in Rowan county, to and through Statesville, in Iredell county, to Asheville, on or near the French Broad river, in Buncombe county; thence along the French Broad river to Paint Rock, in Madison county, and also from said Asheville westward to the Tennessee river at or near the mouth of the Nantahala river, and thence westward to Murphy, in Cherokee county; and all real estate now owned or acquired for the purposes of said railroad, including all station, depot or other grounds held and used in connection therewith; and all rails, railway tracks, sidings, switches, bridges, fences, turn-tables, water tanks, viaducts, culverts, superstructures, passenger and

other depots, station and freight houses, machine shops, buildings, fixtures, rolling stock, equipment, machinery, tools and implements whatsoever, now owned or acquired for the purposes or business of the said Western North Carolina Railroad Company in connection with the said railroad and all the franchises, rights, privileges, easements, income, earnings and profits of the said Western North Carolina Railroad Company, connected with, issuing from or relating to the said above described railroad.

"*The foregoing properties, real, personal, choses in action and franchises*, being embraced in the lien of the second mortgage of the Western North Carolina Railroad Company executed September 2, 1884, *and being sold in foreclosure of the same.*

"A more full and particular description of the property intended to be conveyed by this instrument being contained *in said decree of the 5th of May, 1894*, to which reference is hereby made, *together with all the corporate estate, equity of redemption, rights, privileges, immunities and franchises of said Western North Carolina Railroad Company*, and all the tolls, fares, freights, rents, income, issues and profits of the said railroad, and all interests and claims and demands of every nature and description, and all the reversion and reversions, remainder and remainders thereof, including all the said mortgaged premises and property in said decree directed to be sold, at any time owned or acquired by, and now in the possession of, said Western North Carolina Railroad Company."

The said deed was duly registered in the Register's office for Rowan county, on the 5th of November, 1894.

(For a full copy of said deed, see Record, page 154.)

The purchaser, the Southern Railway Company, under and by virtue of the said decrees of foreclosure and sale, and the deed so executed, and delivered, entered into and took possession of the railroad and property and franchise in August, 1894, and has been *in the possession of the same ever since, as sole, absolute and exclusive owner.*

This ownership, on the part of the Southern Railway Company, sole and absolute, is subject only to the lien of the first

mortgage, the trustee in that mortgage being the Central Trust Company of New York. The date of that mortgage is the 1st of September, 1884.

After the foreclosure and sale of the said property, the railroad and franchises, the Western North Carolina Railroad Company, corporation, *had no estate, no interest, in the railroad whatsoever, nor in the franchises*, whatsoever.

The foreclosure suit was, in all respects, in the due form, and orderly course of the court.

The decrees so entered, as aforesaid, of foreclosure and sale, and of confirmation of sale, in which the purchaser was adjudicated to be the sole owner of this property and franchises, adjudicated also that ownership to be free from all equity of redemption of the Western North Carolina Railroad Company, or any one claiming by, under, or through it, except the prior mortgage.

It is to be noted that the corporation and stockholders were bound by these decrees. So are all persons or parties claiming by, under or through the stockholders, as are all those claiming by, under or through the corporation.

Since August, 1894, no person, no corporation, no company has had any estate in this property and franchises sold as aforesaid, except the Southern Railway Company, a corporation created in the State of Virginia, and doing business in North Carolina.

Since August, 1894, this railway company has been in the undisputed, sole possession of the Western North Carolina Railroad as its owner, and has operated the same under and by virtue of its ownership, absolute and unqualified, of the franchises of the Western North Carolina Railroad Company, a corporation created under the laws of North Carolina, which franchises were purchased at the said foreclosure sale with the other property of the said corporation, all of which is evidenced by the deed referred to in this brief, and printed on pages 98, 99, &c., of the record in the former suit.

It is not denied that the Western North Carolina Railroad Company had, under its charter and statutes of the State, the power to mortgage its franchise and other property.

To render this power effective, is carried with it, the power of foreclosure and sale.

This is expressly decided in the case of *New Orleans, &c.*, vs. *Delamore*, 114 U. S. Reports, 501.

A mortgage, with no power to foreclose, *would be worthless and ineffective.*

This was the state of affairs in 1896, November, when James and Howard lost their lives, one an engineer, and the other a fireman, in the service of the Southern Railway Company. These men were killed on the line of this railroad two years and three months *after the foreclosure sale*, at a time when the Western North Carolina Railroad Company had no possible interest, no possible estate, in the Western North Carolina Railroad, and none in the franchises of the corporation, both of which had been sold and bought by the complainant in August, 1894.

These men, James and Howard, were not in the employment of the Western North Carolina Railroad Company; and never had been in its employment.

The power to employ servants had been sold, together with its other powers and franchises, and bought by the Southern Railway Company, more than two years before the deaths of these men. At that time the Western North Carolina Railroad Company had no power to do anything, but exist as a corporation. It had no power to operate a railroad; no power of eminent domain; no power to employ servants or officers. All of these powers had been mortgaged, had been foreclosed, had been sold, under decrees of the Circuit Court of the United States. They were all purchased by the Southern Railway Company. Two decrees of the Circuit Court in May and August, 1894, solemnly adjudicated, that these powers, franchises and railroad, real and

personal property, were the property of the Southern Railway Company.

These decrees, one of foreclosure, and the other, of confirmation of sale, were duly entered in the Circuit Court of the United States, *three years before any adjudication was had in any State court*, in the James and Howard cases, as they are styled. When these actions were begun in the State Court, the Superior Court of Rowan County, North Carolina, against the Western North Carolina Railroad Company, to recover damages from that company, for alleged negligence of the company operating the railroad, *these decrees had long since been entered*, in the Circuit Court.

As appears from the exhibits in the record, the rights of these parties to have satisfaction of their judgments obtained against the Western North Carolina Railroad Company, James and Howard, are based upon the charge of fraud in obtaining these decrees in the foreclosure proceedings. Pages 94, 95, 96, 97, &c., of the record in former suit.

It cannot be shown anywhere, *that the Southern Railway Company ever pretended to take possession of this property, and franchises under any lease.*

Its title to the same, rests upon decrees of the Circuit Court of the United States. That being so, it seems to us, that the liability of the lessor for the tort of its lessee, has nothing to do with this case.

It is true the lessor, in a case of the kind mentioned by the counsel for defendants, has been held in a number of cases liable for the negligence of the lessee in North Carolina; but these decisions are all contrary to those of the United States Courts, and, indeed, of all the other States. It is a matter of general law, and this court is not bound by such decisions, if they were involved in this case. *Baltimore & Ohio R. R. Co.* vs. *Baugh*, 149 U. S. Rep., 378. *Arrowsmith* vs. *Nashville, &c., R. Co.*, 57 Fed. Rep., 165. In this case all the cases are reviewed by Judge Linton.

It is contended, in the brief of counsel for defendants, that

the decree, and opinion of this court, in former case, is *res adjudicata*. That was a supplemental bill filed to restrain and enjoin the prosecution of the suit of Pearson and others, stockholders, with whom these same parties joined to set aside the decree of foreclosure and sale and confirmation of sale, on the ground of fraud.

It was decided, Judge Morris delivering the opinion, that the complainants *were entitled to the relief demanded in the bill;* and, to that extent, the decree of Judge Simonton, on the Circuit, was affirmed.

In the opinion of Judge Morris, there was a direction that the decree appealed from, be modified so as to embrace no more *than was prayed for in the bill, that is to say, that the further prosecution of that suit be enjoined.*

In the decree entered on the Circuit, in pursuance of the mandate, there were recited certain things not enjoined, one being, that Mrs. James and Mrs. Howard were not enjoined from bringing any other suit, as they might be advised. 98 Fed. Rep., 495.

The opinion of the court, however, was direct that any suit, based upon the supposed rights of the stockholders, be, and is, enjoined. This was because the stockholders were represented in the foreclosure suit. They had had their day in court.

It is the same, as to the defendant corporation, *The Company, The Western North Carolina Railroad Company,* had had its day in court. Of course, the company was estopped, also, and as the *stockholders* were, and *all persons claiming under them,* so was the *corporation, defendant,* and all *persons claiming under, by, or through it.*

How do these parties claim? Their claims, their judgments, originated, *in something the corporation is alleged to have done two years, and more, after the decree of the Circuit Court adjudicated the Southern Railway Company, to be the absolute owner of the railroad and franchises, sold under the foreclosure proceeding.*

So these parties do claim under and by reason of *the acts of the corporation*, and the purpose of the defendant, Julian, as disclosed in his advertisement of sale, is in defiance of the decree of the Circuit Court, affirmed by this court.

The executions under which the sheriff was acting were as follows:

"STATE OF NORTH CAROLINA,
"*Rowan County.*

"IN THE SUPERIOR COURT.

"To the Sheriff of Rowan County, Greeting:

"Whereas judgment was rendered on the 21st day of February, 1898, in the Superior Court of Rowan County in an action between Clemye James, admrx. of W. A. James, plaintiff, and The Western North Carolina Railroad Company, defendant, in favor of the said Clemye James, admrx. of W. A. James, against the said defendant, The Western North Carolina Railroad Company, for the sum of $15,000 and costs, as appears to us by the judgment roll filed in the office of the clerk of the said County of Rowan; and, whereas, the judgment was docketed in the said County of Rowan on the 21st day of February, 1898, and the sum of $15,000 is due thereon, with interest on the said $15,000 from the 3rd day of May, 1897, until paid, and the further sum of $161.65 for costs and disbursements expended in the said suit whereof the said defendant, The Western North Carolina Railroad Company, is liable.

"You are therefore commanded, as often before, to satisfy the said judgment out of the personal property of the said defendant within your county; or, if sufficient personal property cannot be found, then out of the real property of the defendant and out of the corporate property, real and personal, of the said defendant, including its corporate franchises, corporate rights, privileges, powers, immunities, and all of the appurtenances belonging, or in anywise connected with or appertaining to it as a body corporate, *as owned and held by it on the day when the said judgment was so docketed in the said county of Rowan, or at any time thereafter, in whose hands soever the same may be;* and have you this execution,

together with the money, before our said court at the courthouse in Salisbury on the 11th Monday after the first Monday in September, 1901, it being the 18th day of November, 1901, then and there to render the same to the said plaintiff.

"Witness W. G. Watson, clerk of our said court, at office in Salisbury, on the first Monday in September, 1901.

"Issued this the 3rd day of September, 1901.

"W. G. WATSON,
"*Clerk Superior Court.*"

"STATE OF NORTH CAROLINA,
"*Rowan County.*

IN THE SUPERIOR COURT.

"To the Sheriff of Rowan County, Greeting:

"Whereas, judgment was rendered on the 21st day of February, 1898, in the Superior Court of Rowan county in an action between Fannie E. Howard, Admx. of Jno. H. A. Howard, and the Western North Carolina Railroad Company, defendant, in favor of the said Fannie E. Howard, Admx. of Jno. H. A. Howard, against the said defendant, the Western North Carolina Railroad Company for the sum of $5,000 and costs, as appears to us by the judgment roll filed in the office of the clerk of the said county of Rowan; and, whereas, the judgment was docketed in the said county of Rowan on the 21st day of February, 1898, and the sum of $5,000 is due thereon, with interest on the said $5,000 from the 21st day of February, 1898, until paid and the further sum of $140.13 for costs and disbursements expended in the said suit whereof the said defendant, the Western North Carolina Railroad Company is liable:

"You are therefore commanded, as often before, to satisfy the said judgment out of the personal property of the said defendant within your county; or if sufficient personal property cannot be found, then out of the real property of the defendant and out of the corporate property, real and personal of the said defendant, including its corporate franchises, corporate rights, privileges, powers, immunities and all its appurtenances belonging or in anywise connected with or appertaining to it as a body corporate *as owned and held by it on the day when the said judgment was so docketed*

in the said county of Rowan, or at any time thereafter, in whose hands soever the same may be; and have you this execution, together with the money, before our said court at the court-house in Salisbury on the 11th Monday after the first Monday in September, 1901, it being the 18th day of November, 1901, then and there to render the same to the said plaintiff.

"Witness W. G. Watson, clerk of our said court at office in Salisbury, the first Monday in September, 1901.

"Issued this the 3rd day of September, 1901.

"W. G. WATSON,
"*Clerk Superior Court.*"

The foregoing executions were levied on the *corporate property and real estate of the said Western North Carolina Railroad*, including corporate rights, franchises, privileges, powers, immunities, &c., on the 3d of September, 1901.

The following is the notice of sale, published by the Sheriff:

"SALE OF THE WESTERN NORTH CAROLINA RAILROAD UNDER EXECUTION.

"By virtue of executions issuing from the Superior Court of Rowan county, North Carolina, one in favor of Clemye James, Admrx. of W. A. James, for $15,000.00, interest and costs, and the other in favor of Fannie E. Howard, Admx. of Jno. H. A. Howard, for $5,000.00, interest and costs, upon judgments duly docketed in the Superior Court of said county of Rowan, reference hereby being had to the said judgments for a fuller description thereof, and by virtue of the levy made thereunder, the undersigned, as Sheriff of Rowan county, State of North Carolina, *will sell agreeably to the laws of the State in this behalf provided*, at public auction to the highest bidder, at the court-house door in Salisbury, on Monday, the 7th day of October, A. D., 1901, at the hour of 12 m., all and singular *the corporate property of the defendant, The Western North Carolina Railroad*, existing in the State of North Carolina, including *its corporate franchises, rights, privileges, immunities, easements and appurtenances of every kind appertaining*, belonging to, or in anywise connected

therewith, *or issuing out of and relating to the said The Western North Carolina Railroad*, together with all *of its property in the State of North Carolina*, and *including its road-bed and right of way, its real estate acquired and owned for railroad purposes, its stations, depots, grounds, its railway tracks, switches, sidings, bridges, fences, turn-tables, water tanks, viaducts, culverts, superstructures, passenger, freight and other houses, machine shops, buildings and fixtures—the said railroad extending from the town of Salisbury through Statesville, Newton, Hickory, Morganton, Marion, Asheville to Paint Rock in Madison county, and from Asheville westward by way of Waynesville to Murphy in Cherokee county*—reference being had for a further description of *said road and its property, rights and franchises to the charter of the said road and the amendments thereto enacted* from time to time by the General Assembly of North Carolina.

"This, the 4th day of Sept., 1901.

"D. R. JULIAN,
"*Sheriff of Rowan County.*"

It is to be observed that the sheriff in the above notice of sale says he "*will sell agreeably to the laws of the State, in this behalf provided*," the property and franchises levied on.

The following is the statute, under which he proposed to sell "*agreeably to the laws of the State:*"

Sec. 674 of the Code of North Carolina:

"The officers making sale shall by deed convey to the purchaser all the immunities and privileges which by law belong to the corporation, so far as relates to the right of demanding fare and toll; *and the officer shall immediately after such sale, deliver to the purchaser possession of all the corporate real property connected with the franchise, belonging to such corporations*, in whatever county the same may be situated, and the purchaser may thereupon demand and receive to his own use all the fare and toll which may accrue within the time limited by the term of his purchase, in the same manner and under the same regulations as such corporation was before authorized to demand and receive."

The sheriff in the execution was directed to satisfy the same, one in the sum of $15,000, and the other in the sum

of $5,000, by sale of property "as owned and held by it," the corporation, the Western North Carolina Railroad Company, "on the day when the said judgments were docketed in said county of Rowan."

The judgments were docketed in February, 1898, *years after the decree, and years after the registration of the deed of conveyance to the Southern Railway Company*, made and executed by order of the Circuit Court.

At the time of the docketing of the said judgments, the Western North Carolina Railroad Company owned no property, in so far, as appears here. Certainly it had no interest or estate in this property, the Western North Carolina Railroad, nor in the franchises purchased by the Southern Railway Company, in August, 1894.

It is insisted that the Supreme Court of North Carolina adjudicated in the case of *James* vs. *W. N. C. R. R. Co.*, that this property was liable for these judgments. 121 N. C. Rep., 528.

Nothing was adjudicated in that case except the matter, the question before the court, which was whether the old corporation *was dissolved under section 697 of the Code of North Carolina, by the sale and conveyance in accordance with the terms of the mortgage.*

The court decided, the old corporation was not dissolved. We say, this was the question before the court.

See Judge Simonton's opinion, page 30, Fed. Reporter, Vol. 89.

This was in September, 1897, in a case prosecuted against the Western North Carolina Railroad Company, by Mrs. James, executrix, for the death of James, dec'd, and intestate.

The case was tried in the county of Rowan, and there was a judgment for the defendant, which judgment was reversed by the Supreme Court, on appeal, at the September term of the court for the year 1897. It is alleged in the reply of the plaintiff, copy of which is set out in the bill on pages 26, 27

and 28, &c., that this sale, by orders and decrees of the Circuit Court, and in accordance with its decrees, *was only a pretended sale*, and that the Southern Railway Company *had no title to the railroad or its franchises.*

The only question, however, *decided* in the case *was*, as before said, whether there was a dissolution of the corporation.

Yet this court is asked to decree that the former decrees of the Circuit Court, entered in 1894, more than two *years before the deaths of James and Howard are nullities, and that the Southern Railway Company is not the owner of the property and franchise conveyed to it by the Circuit Court.* In *two decrees*, entered in *1894, in the Circuit Court*, the Southern Railway Company *was adjudicated to be the absolute owner of this property.*

In the next place there are no lien laws in North Carolina which make judgments in favor of parties against a railroad company liens upon property owned by other parties, whether corporations or not, purchased under foreclosure proceedings, *before the events out of which the judgments were obtained*, transpired.

When the causes of action originated, in 1896, November 18th, the Southern Railway Company had been in possession of this property and franchise as purchaser for more than two years.

Under the law providing for sale of the property levied on by the sheriff, he was compelled to deliver possession of the same to the purchaser, *immediately* after sale.

This would be *irreparable damage and to cast a cloud upon complainant's title.*

This relief asked is not in violation of Section 720, of the Revised Statutes.

It is to arrest the hand of this officer, in attempting to seize the property of complainant, illegally.

This officer is not the agent of these plaintiffs in the executions copied in the bill. He was directed what to do; and,

what not to do. If he could find property, belonging to the defendant in the execution, he was bound to seize it; but the property he proposed to seize, was not "*owned by the defendant.*" There was a deed, duly registered, showing that it was the property of the Southern Railway Company. It was, at least, a *presumption*, that it was so owned, and there was a way, pointed out by the law, by which this title could have been tested. His proposition to *seize it, and deliver it to the plaintiffs in the execution, or purchasers*, was not in pursuance of his agency for the plaintiffs. It was a trespass, threatened, and one the court will enjoin in protection of its purchaser. See Judge Simonton's opinion in 89 Fed. Rep., page 24. Also, opinion of Judge Boyd, in the record.

We might safely rest this case upon these two opinions.

In so far as the standing of these *parties in court, is concerned*, they are as much bound by the decrees of the circuit court, as the stockholders; or, the corporation. Whatever rights they have, come to them, through acts of the corporation. And, as the *corporation* is estopped, so are *these parties claiming by, under, and through it.*

CHARLES PRICE,
Solicitor for Complainants.

In fine; to restate the contention of the respondent, opposing the granting of the writ of certiorari, we submit:

There is no conflict of decision, between the Supreme Court of North Carolina, and any Court of the United States in this proceeding.

The foreclosure proceeding, in the Circuit Court, of the United States, under which, the Southern Railway Company, became the absolute owner of the Western North Carolina Railroad, and franchises of the corporation, was regular; the title to the railroad, and franchises, was duly vested in the *Southern Railway Company, by reason of this proceeding.*

This was the 22nd of August, 1894, the deed from the Master, bearing that date. Printed record, page 154.

This deed was made by order of the Court, and covered all the property, and franchises, involved in this suit, and WAS MORE THAN TWO YEARS, BEFORE, the alleged claims of James and Howard, ORIGINATED.

Then, at the time of the alleged negligent homicide, of James and Howard, in 1896, servants of the purchaser, and who, at no time, ever were the employés of the Western North Carolina Railroad Company, which had, in no way, consented to their being employed, (and which had no power to so consent,) by the said Southern Railway Company, the old Western North Carolina Railroad Company, corporation, *had no estate, of any kind, no interest of any kind,* in the Western North Carolina Railroad, or said franchises.

In the face of this fact, it is contended here, by petitioners, that, this property, these franchises, can be extended, by, and under final process, issued, upon a judgment, entered against *the Western North Carolina Railroad Company,* two years after the said sale, and, execution of the deed, by the Master, in satisfaction of the same.

In the first place, at the time of the judgments, the defendant, the Western North Carolina Railroad Company, HAD NO PROPERTY OF ANY KIND; not even, a FRANCHISE, except that, to be, and exist as a corporation. Memphis R. R. Co. *vs.* Coms., 112 U. S., 610.

It is maintained, that the defendant, was liable, as a lessor. The possession of the Southern Railway Company, was not that of lessee, but as PURCHASER AT A FORECLOSURE SALE.

How was the Western North Carolina Railroad Company any lessor?

It could not be, of this property. Because, the property, and franchises, were both in possession of the Southern Railway Co., as purchaser, under the decrees of the Circuit Court of the United States. See page 123, Record. Decree of confirmation of sale, Aug. 22, 1894.

For record of foreclosure suit, sale, etc., etc., see Record, page 90, etc.

From no possible standpoint, can the Southern Railway be anything, but *a purchaser of the property, and franchises.*

If the property is in possession of the Southern Railway Co., as such purchaser, being the absolute owner of the same, how can any suit, against the mortgagor, upon an alleged cause of action, having its *origin two years, and three months,* after the foreclosure sale, and date of the deed, affect the said purchaser's title?

In the Burnett case, 123 N. C. Rep., the *claim originated,* in 1894, he Burnett being a passenger, and injured, by reason of the negligence of the railroad company, *at that time.*

The deed of trust was made, in 1891, and the *foreclosure in 1897,* three years, *after the claim originated.*

By reason of section 1255, of the Code of North Carolina, this CLAIM, which arose in 1894, became a lien upon the property, superior to that of the mortgage, and, of course, was to be paid, before the purchaser, at the foreclosure sale, in 1897, could acquire the property, absolutely, and unencumbered.

In the case at Bar, the purchaser took the property, and franchises, unencumbered, because, two years, *before deaths of James and Howard.*

Here the sale was in 1894, and the deaths of James and Howard in 1896, November 18th, and as said, by the Circuit Court of Appeals, Judge Simonton, "It would be monstrous to affirm, that, in spite of this, the railroad property, and its franchises, remained in the Western North Carolina Railroad Company, subject to its debts, INCURRED AFTER THE SALE.

And so it would; it would be treating the sale, admitted to be regular and valid, as a nullity. It would be an utter failure to give effect to the decrees, orders, etc., of the Circuit Court of the United States.

The validity of the judgments of the State Court is not questioned, in this proceeding. It is the protection of the purchaser, in the use, and enjoyment, of property conveyed,

by the decree of the Court, solemnly entered, from seizure, by the sheriff, directed by process, in his hands, to sell property, *if such he could find*, in satisfaction of the same, *of the Western North Carolina Railroad Company*, owned by that Company, *at the date of the judgment, or, we may say, at date of origin of the claims*, of James and Howard, KILLED IN 1896, TWO YEARS AND THREE MONTHS, AFTER the Southern Railway Company became the sole owner of the said property, to wit, the railroad and franchises of the Western North Carolina Railroad Company, mortgagor.

If the killing of the said James and Howard had been before sale, and before the decree, and Master's deed, as in the Burnett case, then, the *property*, and *franchises*, would have been bound, under Section 1255 of the Code.

But, *then it must be established, and amount ascertained, against the person*, having the property, and operating it, *under the franchise*.

Otherwise, if twenty years elapse, after the property was conveyed, sold to the Southern Railway Company, this same property, *could be taken, and sold, under final process*, for a debt of the Western North Carolina Railroad Company—a judgment growing out of a disaster, 20 years, also, after the sale, and deed.

To accomplish the end, aimed at, in taking, in this way, the property of the Southern Railway Company, for the debt of the Western North Carolina Railroad Company, incurred, over two years, after the consummation of the title to the same, by the Southern, would be *to nullify the foreclosure proceedings of 1894*, in the Circuit Court of the United States. It would be in disregard of the principles laid down by Justice Shiras, in Farmers' Loan & Trust Co. *vs.* Lake Shore & St. Railroad, 177 U. S., 61.

CHARLES PRICE,
Solicitor for Respondents, Southern Railway Company and Central Trust Company of New York.

FEBRUARY 24, 1903.

Supreme Court of the United States

OCTOBER TERM, 1903.

No. 139.

DAVID R. JULIAN, SHERIFF, ET AL., PETITIONERS,

vs.

THE CENTRAL TRUST COMPANY ET AL.

BRIEF FOR THE RESPONDENTS.

CHARLES PRICE,
Solicitor for Respondents.

WILLIAM A. HENDERSON,
F. H. BURBEE,
Of Counsel.

(18,685.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 139.

DAVID R. JULIAN, SHERIFF; MRS. CLEMYE JAMES, ADMINISTRATRIX OF W. A. JAMES, AND MRS. FANNIE E. HOWARD, ADMINISTRATRIX OF JOHN H. A. HOWARD, PETITIONERS,

vs.

THE CENTRAL TRUST COMPANY OF NEW YORK AND THE SOUTHERN RAILWAY COMPANY, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR RESPONDENTS.

In support of the decree of the circuit court of the United States for the western district of North Carolina, entered on the 19th day of December, 1901, to be found on printed pages of the record, 42 and 43; and duly affirmed by a decree, printed on page 207, entered in circuit court of appeals, May 10, 1902; and, in answer to the brief, of petitioners' counsel, we submit the following:

STATEMENT OF THE CASE.

There was a foreclosure suit, prosecuted in the circuit court of the United States, western district of North Carolina, the purpose of which was, to foreclose a second mortgage, executed by the *Western North Carolina* Railroad Company, to the Central Trust Company of New York, trustee, of the date of the 2d of September, 1884 (Record, p. 95).

There was a decree of foreclosure and sale, duly entered in said suit May 2, 1894, and filed in the office of the clerk, at Statesville, May 5, 1894.

This decree of foreclosure and sale so entered and filed, as aforesaid, in May, 1894, provides, amongst other things, as follows:

"The *purchaser or purchasers* of this property herein decreed to be sold," the Western North Carolina railroad and its franchises, "shall be invested with and shall hold, possess and enjoy the said mortgaged premises and property herein decreed to be sold, and all the rights, privileges and franchises, appertaining thereto, as fully and completely, as the Western North Carolina railroad *now holds and enjoys, or has heretofore held and enjoyed the same;* and further, the said purchaser or purchasers," and in this case, the Southern Railway Company, "shall have and be entitled to hold the *said railroad and property discharged of and from the lien of the mortgage foreclosed,* in this suit, and from the claims of the *parties to this suit or any of them,* except the first consolidated mortgage of September 1st, 1884" (Record, p. 108).

After this decree of sale, the property, that is to say, the Western North Carolina railroad and franchises, were sold in pursuance of the same, when the Southern Railway Company, a corporation originally created, in the State of Virginia, and doing business in the State of North Carolina, duly authorized to do so, became the purchaser. On the 22d day of August, 1894, there was a decree of confirma-

tion of sale, duly entered in the circuit court of the United States, which provides, among other things, as follows (Record, p. 124):

"It is further ordered and decreed that the special master is hereby authorized and directed, on the request of said purchaser, to sign, seal, execute, acknowledge and deliver a *proper deed of conveyance to the said* Southern Railway Company, conveying to it, all and singular, the railroad, equipment, property and *franchises* so as aforesaid, sold under the decree of this court, free from any and all equity of redemption of the said Western North Carolina Railroad Company, *or any one claiming by, under or through it, except the prior mortgages recited in such decree.* Upon the delivery of such conveyance by the special master the said *Southern Railway Company shall fully possess, and be invested with all of the estate, right, title and interest in, to and of such railroad, equipment, property and franchises so sold under the decree of this court as the absolute owner thereof, to have and hold the same to it and its successors and assigns forever.* In order to facilitate the recording thereof, four counterparts, of such deeds may be executed, acknowledged and delivered by the special master, all or any one or more of which may be recorded, and any one or more of such counterparts, when executed, acknowledged and delivered, shall severally or collectively be deemed to be an original, and for all intents and purposes constitute a single instrument.

"On August 31st, 1894, on exhibition of the deed executed and delivered by the special master herein ordered, the defendant company is authorized, directed and required forthwith to deliver over to the said Southern Railway Company the possession of all and singular the railroad and property described in and conveyed by such deed.

"It is also further ordered that by way of further assurance and confirmation of title to such Southern Railway Company of the property so by it purchased under the decree of this court, the said The Western North Carolina Railroad Company, by its proper officers and under its corporate seal, and the Central Trust Company of New York, trustee, shall, upon request of said Southern Railway Company, sign, seal, execute, acknowledge and deliver to said Southern Railway Company all proper deeds of conveyance, transfer, release and further assurance of all the railroad, property

and franchises so as aforesaid sold under the decree of this court and embraced in the deed of the special master, *so as fully and completely to transfer to and invest in the said Southern Railway Company the full, legal and equitable title to all such railroad, property and franchises sold or intended to be sold under the decree of this court.*"

In pursuance of the decree, so as aforesaid, duly entered, there was a deed executed and delivered by the special master, to the purchaser, The Southern Railway Company, complainant, on the 22d of August, 1894, conveying to the purchaser, the property, as follows:

"All and singular the railroad of the said Western North Carolina Railroad Company in the State of North Carolina, extending from Salisbury, in Rowan county, to and through Statesville, in Iredell county, to Asheville, on or near the French Broad river, in Buncombe county; thence along the French Broad river to Paint Rock, in Madison county, and also from said Asheville westward to the Tennessee river at or near the mouth of the Nantahala river, and thence westward to Murphy, in Cherokee county; and all real estate now owned or acquired for the purposes of said railroad, including all station, depot or other grounds held and used in connection therewith; and all rails, railway tracks, sidings, switches, bridges, fences, turn-tables, water tanks, viaducts, culverts, superstructures, passenger and other depots, station and freight houses, machine shops, buildings, fixtures, rolling stock, equipment, machinery, tools and implements whatsoever, now owned or acquired for the purposes or business of the said Western North Carolina Railroad Company in connection with the said railroad and all the franchises, rights, privileges, easements, income, earnings and profits of the said Western North Carolina Railroad Company, connected with, issuing from or relating to the said above-described railroad.

"*The foregoing properties, real, personal, choses in action and franchises*, being embraced in the lien of the second mortgage of the Western North Carolina Railroad Company executed September 2, 1884, *and being sold in foreclosure of the same.*

"A more full and particular description of the property intended to be conveyed by this instrument being contained *in said decree of the 5th of May, 1894*, to which reference is hereby made, *together with all the corporate estate, equity of redemption, rights, privileges, immunities and franchises of said Western North Carolina Railroad Company*, and all the tolls, fares, freights, rents, income, issues and profits of the said railroad, and all interests and claims and demands of every nature and description, and all the reversion and reversions, remainder and remainders thereof, including all the said mortgaged premises and property in said decree directed to be sold, at any time owned or acquired by, and now in the possession of, said Western North Carolina Railroad Company."

The said deed was duly registered in the register's office for Rowan county, on the 5th of November, 1894.

(For a full copy of said deed, see Record, page 154.)

The purchaser, the Southern Railway Company, under and by virtue of the said decrees of foreclosure and sale, and the deed so executed, and delivered, entered into and took possession of the railroad and property and franchise in August, 1894, and has been *in the possession of the same ever since, as sole, absolute and exclusive owner.*

This ownership, on the part of the Southern Railway Company, sole and absolute, is subject only to the lien of the first mortgage, the trustee in that mortgage, being the Central Trust Company of New York. The date of that mortgage is the 1st of September, 1884.

After the foreclosure and sale of the said property, the railroad and franchises, the Western North Carolina Railroad Company, corporation, *had no estate, no interest, in the railroad whatsoever; nor, in the franchises*, whatsoever.

The foreclosure suit was, in all respects, in due form, and orderly course of the court.

The decree so entered, as aforesaid, of foreclosure and sale, and of confirmation of sale, *in which the purchaser was adjudicated to be the sole owner of this property and franchises*,

adjudicated also, that ownership, to be free from all equity of redemption of the Western North Carolina Railroad Company, or any one, claiming by, under, or through it, except the prior mortgage.

It is to be noted that the corporation and stockholders were bound by these decrees. So are all persons or parties claiming by, under or through the stockholders, as are all those claiming by, under or through the corporation.

Since August, 1894, no person, no corporation, no company has had any estate in this property and franchises, sold as aforesaid, except the Southern Railway Company, a corporation created in the State of Virginia, and doing business in North Carolina.

Since August, 1894, this railway company has been in the undisputed, sole possession of the Western North Carolina railroad, as its owner, and has operated the same, under and by virtue of its ownership, absolute and unqualified, of the franchises, of the Western North Carolina Railroad Company, a corporation, created under the laws of North Carolina, which franchises, were purchased at the said foreclosure sale, with the other property, of the said corporation, all of which, is evidenced by the deed referred to, in this brief, and printed on pages 154, 155, &c., of the Record.

ARGUMENT.

It is not denied that the Western North Carolina Railroad Company had, under its charter and statutes of the State, the power to mortgage its franchise and other property.

To render this power effective, is carried with it, the power of foreclosure and sale.

This is expressly decided in the case of *New Orleans, &c., vs. Delamore*, 114 U. S. Reports, 501.

A mortgage, with no power to foreclose, *would be worthless and ineffective.*

This was the state of affairs in 1896, November, when James and Howard lost their lives, one, an engineer, and the other, a fireman, in the service of the Southern Railway Company. These men were killed on the line of this railroad *two years and three months after the foreclosure sale,* at a time when the Western North Carolina Railroad Company had no possible interest, no possible estate, in the Western North Carolina railroad, and none in the franchises of the corporation, both of which had been *sold, and bought by the complainant in August, 1894.*

These men, *James and Howard, were not in the employment of the Western North Carolina Railroad Company: and never had been in its employment.*

The power to employ servants had been sold, together with its other powers and franchises, and bought by the Southern Railway Company, more than two years before the deaths of these men. At that time the Western North Carolina Railroad Company, had no power to do anything, but exist as a corporation. It had no power to operate a railroad; no power of eminent domain; no power to employ servants or officers. *All of these powers* had been mortgaged, had been foreclosed, had been sold, under decrees of the circuit court of the United States. They were all purchased by the Southern Railway Company. *Two decrees of the circuit court in May and August, 1894, solemnly adjudicated, that these powers, franchises and railroad, real and personal property, were the property of the Southern Railway Company.*

These decrees, one of foreclosure, and the other, of confirmation of sale, were duly entered in the circuit court of the United States, *three years before any adjudication was had in any State court,* in the James and Howard cases, as they are styled. When these actions were begun in the State court, the superior court of Rowan county, North Carolina, against the Western North Carolina Railroad Company, to recover damages from that company, for alleged negligence

of the company operating the railroad, *these decrees had long since been entered*, in the circuit court.

As appears from the exhibits in the record, the rights of these parties to have satisfaction of their judgments obtained against the Western North Carolina Railroad Company, James and Howard, are based upon the charge of fraud in obtaining these decrees, in the foreclosure proceedings (Record, pp. 77–78, &c.).

It cannot be shown anywhere, *that the Southern Railway Company ever pretended to take possession of this property, and franchises under any lease.*

Its title to the same, rests upon decrees of the circuit court of the United States. That being so, it seems to us, that the liability of the lessor, for the tort of its lessee, has nothing to do with this case.

It is true the lessor, in a case of the kind mentioned by the counsel for defendants, has been held in a number of cases liable for the negligence of the lessee in North Carolina; but these decisions are all contrary to those of the United States courts, and, indeed, of all the other States. It is a matter of general law, and this court is not bound by such decisions, if they were involved in this case (*Baltimore & Ohio R. R. Co. vs. Baugh*, 149 U. S. Rep., 378; *Arrowsmith vs. Nashville &c. R. Co.*, 57 Fed. Rep., 165). In this case all the cases are reviewed by Judge Lurton.

It is contended, in the brief of counsel for defendants, that the decree, and opinion of this court, in former case, is *res adjudicata*. That was a supplemental bill filed to restrain and enjoin the prosecution of the suit of Pearson and others, *stockholders*, with whom these same parties joined to set aside the decree of foreclosure and sale and confirmation of sale, on the ground of fraud.

It was decided, Judge Morris delivering the opinion, that the complainants *were entitled to the relief demanded in the bill;* and, to that extent, the decree of Judge Simonton, on the circuit, was affirmed.

In the opinion of Judge Morris, there was a direction that the decree appealed from, be modified, so as to embrace no more *than was prayed for in the bill, that is to say, that the further prosecution of that suit be enjoined.*

In the decree entered on the circuit, in pursuance of the mandate, there were recited certain things not enjoined, one being, that Mrs. James and Mrs. Howard were not enjoined from bringing any other suit, as they might be advised (98 Fed. Rep., 495).

The opinion of the court, however, *was direct that any suit,* based upon the supposed rights of the stockholders, be, and is, enjoined. This was because the stockholders were represented in the foreclosure suit. They had had their day in court.

It is the same, as to the defendant corporation. *The Company, The Western North Carolina Railroad Company,* had had its day in court. Of course, the company was estopped, also, and as the *stockholders* were, and *all persons claiming under them,* so was the *corporation, defendant,* and all *persons claiming under, by, or through it.*

How do these parties claim? Their claims, their judgments, originated, *in something the corporation is alleged to have done, two years, and more, after the decree of the circuit court adjudicated the Southern Railway Company, to be the absolute owner of the railroad and franchises, sold under the foreclosure proceeding, in fee forever.*

So these parties do claim under and by reason of *the acts of the corporation,* and the purpose of the defendant, Julian, as disclosed in his advertisement of sale, is in *defiance of the decrees* of the circuit court, affirmed by circuit court of appeals.

The executions under which the sheriff was acting were as follows:

"STATE OF NORTH CAROLINA,
"*Rowan County.*

"IN THE SUPERIOR COURT.

"*To the sheriff of Rowan county, Greeting*:

"Whereas judgment was rendered on the 21st day of February, 1898, in the superior court of Rowan county in an action between Clemye James, admrx. of W. A. James, plaintiff, and The Western North Carolina Railroad Company, defendant, in favor of the said Clemye James, admrx. of W. A. James, against the said defendant, The Western North Carolina Railroad Company, for the sum of $15,000 and costs, as appears to us by the judgment roll filed in the office of the clerk of the said county of Rowan; and, whereas, the judgment was docketed in the said county of Rowan on the 21st day of February, 1898, and the sum of $15,000 is due thereon, with interest on the said $15,000 from the 3rd day of May, 1897, until paid, and the further sum of $161.65 for costs and disbursements expended in the said suit whereof the said defendant, The Western North Carolina Railroad Company, is liable.

"You are therefore commanded, as often before, to satisfy the said judgment out of the personal property of the said *defendant within your county;* or, if sufficient personal property cannot be found, then out of the real property of the defendant, and out of the corporate property, real and personal, of the said defendant, including its corporate franchises, corporate rights, privileges, powers, immunities, and all of the appurtenances belonging, or in anywise connected with or appertaining to it as a body corporate, *as owned and held by it on the day when the said judgment was so docketed in the said county of Rowan, or at any time thereafter, in whose hands soever the same may be;* and have you this execution, together with the money, before our said court at the courthouse in Salisbury on the 11th Monday after the first Monday in September, 1901, it being the 18th day of November, 1901, then and there to render the same to the said plaintiff.

"Witness W. G. Watson, clerk of our said court, at office in Salisbury, on the first Monday in September, 1901.

"Issued this the 3rd day of September, 1901.

"W. G. WATSON,
"*Clerk Superior Court.*"

"STATE OF NORTH CAROLINA, }
"*Rowan County.* }

"IN THE SUPERIOR COURT.

"*To the sheriff of Rowan county, Greeting:*

"Whereas, judgment was rendered on the 21st day of February, 1898, in the superior court of Rowan county in an action between Fannie E. Howard, adm'x of Jno. H. A. Howard, and The Western North Carolina Railroad Company, defendant, in favor of the said Fannie E. Howard, adm'x of Jno. H. A. Howard, against the said defendant, The Western North Carolina Railroad Company for the sum of $5,000 and costs, as appears to us by the judgment-roll filed in the office of the clerk of the said county of Rowan; and, whereas, the judgment was docketed in the said county of Rowan on the 21st day of February, 1898, and the sum of $5,000 is due thereon, with interest on the said $5,000 from the 21st day of February, 1898, until paid and the further sum of $140.13 for costs and disbursements expended in the said suit whereof the said defendant, The Western North Carolina Railroad Company is liable:

"You are therefore commanded, as often before, to satisfy the said judgment out of the personal property of the said *defendant within your county;* or if sufficient personal property cannot be found, then out of the real property of the defendant and out of the corporate property, real and personal of the said defendant, including its corporate franchises, corporate rights, privileges, powers, immunities and all its appurtenances belonging or in anywise connected with or appertaining to it as a body corporate *as owned and held by it on the day when the said judgment was so docketed in the said county of Rowan, or at any time thereafter, in whose hands soever the same may be;* and have you this execution, together with the money, before our said court at the courthouse in Salisbury on the 11th Monday after the first Monday in September, 1901, it being the 18th day of November, 1901, then and there to render the same to the said plaintiff.

"Witness W. G. Watson, clerk of our said court at office in Salisbury, the first Monday in September, 1901.

"Issued this the 3rd day of September, 1901.

"W. G. WATSON,
"*Clerk Superior Court.*"

The foregoing executions were *levied on the corporate property and real estate of the said Western North Carolina Railroad*, including corporate rights, franchises, privileges, powers, immunities, &c., on the 3d of September, 1901.

The following is the notice of sale published by the sheriff:

"SALE OF THE WESTERN NORTH CAROLINA RAILROAD UNDER EXECUTION.

"By virtue of executions issuing from the superior court of Rowan county, North Carolina, one in favor of Clemye James, admrx. of W. A. James, for $15,000.00, interest and costs, and the other in favor of Fannie E. Howard, adm'x of Jno. H. A. Howard, for $5,000.00, interest and costs, upon judgments duly docketed in the superior court of said county of Rowan, reference hereby being had to the said judgments for a fuller description thereof, and by virtue of the levy made thereunder, the undersigned, as sheriff of Rowan county, State of North Carolina, *will sell agreeably to the laws of the State in this behalf provided*, at public auction to the highest bidder, at the court-house door in Salisbury, on Monday, the 7th day of October, A. D. 1901, at the hour of 12 m., all and singular *the corporate property of the defendant, The Western North Carolina Railroad, existing in the State of North Carolina*, including *its corporate franchises, rights, privileges, immunities, easements and appurtenances of every kind appertaining*, belonging to, or in anywise, connected therewith, *or issuing out of and relating to the said The Western North Carolina Railroad*, together with all *of its property in the State of North Carolina*, and *including its road-bed and right of way, its real estate acquired and owned for railroad purposes, its stations, depots, grounds, its railway tracks, switches, sidings, bridges, fences, turn-tables, water tanks, viaducts, culverts, superstructures, passenger, freight and other houses, machine shops, buildings and fixtures—the said railroad extending from the town of Salisbury through Statesville, Newton, Hickory, Morganton, Marion, Asheville to Paint Rock in Madison county, and from Asheville westward by way of Waynesville to Murphy in Cherokee county*—reference being had for a further description of *said road and its property, rights and franchises to the*

charter of the said road and the amendments thereto enacted from time to time by the General Assembly of North Carolina.

"This, the 4th day of Sept., 1901.

"D. R. JULIAN,
"*Sheriff of Rowan County.*"

It is to be observed that the sheriff in the above notice of sale says he "*will sell agreeably to the laws of the State, in this behalf provided,*" the property and franchises levied on.

The following is the statute, under which he proposed to sell "*agreeably to the laws of the State:*"

Sec. 674 of the Code of North Carolina:

"The officers making sale shall by deed convey to the purchaser all the immunities and privileges which by law belong to the corporation, so far as relates to the right of demanding fare and toll; *and the officer shall immediately after such sale, deliver to the purchaser possession of all the corporate real property connected with the franchise, belonging to such corporations, in whatever county the same may be situated,* and the purchaser may thereupon demand and receive to his own use all the fare and toll which may accrue within the time limited by the term of his purchase, in the same manner and under the same regulations as such corporation was before authorized to demand and receive."

The sheriff in the execution was directed to satisfy the same, one in the sum of $15,000, and the other in the sum of $5,000, by sale of property "*as owned and held by it,*" the corporation, the Western North Carolina Railroad Company, "on the day when the said judgments were docketed in said county of Rowan."

The judgments were docketed in February, 1898, *years after the decree, and years after the registration of the deed of conveyance to the Southern Railway Company,* made and executed by order of the circuit court.

At the time of the docketing of the said judgments, the Western North Carolina Railroad Company owned no property, in so far, as appears here. Certainly it had no interest

or estate in this property, the Western North Carolina railroad, nor in the franchises purchased by the Southern Railway Company, in August, 1894.

It is insisted that the supreme court of North Carolina adjudicated in the case of *James vs. W. N. C. R. R. Co.*, that this property was liable for these judgments (121 N. C. Rep. 528).

Nothing was adjudicated in that case except the matter, the question before the court, which was whether the old corporation *was dissolved under section 697 of the Code of North Carolina, by the sale and conveyance in accordance with the terms of the mortgage.*

The court decided, the old corporation was not dissolved. We say, this was the question before the court. (See Judge Simonton's opinion, page 30, Fed. Reporter vol. 89.)

This was in September, 1897, in a case prosecuted against the Western North Carolina Railroad Company, by Mrs. James, adm'x, for the death of James, dec'd, and intestate.

The case was tried in the county of Rowan, and there was a judgment for the defendant, which judgment was reversed by the supreme court on appeal, at the September term of the court for the year 1897. It is alleged in the reply of the plaintiff, copy of which is set out in the bill on pages 71–72, &c., that this sale, by orders and decrees of the circuit court, and in accordance with its decrees, *was only a pretended sale,* and that the Southern Railway Company *had no title to the railroad or its franchises.*

The only question, however, *decided* in the case, *was*, as before said, whether there was a dissolution of the corporation.

Yet this court is asked to decree that the former decrees of the circuit court, entered in 1894, more than two *years before the deaths of James and Howard are nullities; and, that the Southern Railway Company is not the owner of the property and franchise conveyed to it by the circuit court.* In *two decrees,* entered in *1894, in the circuit court,* the Southern Railway

Company *was adjudicated to be the absolute owner of this property.*

In the next place, there are no lien laws in North Carolina which make judgments in favor of parties against a railroad company, liens upon property owned by other parties, whether corporations or not, purchased under foreclosure proceedings, *before the events out of which the judgments were obtained,* transpired.

When the causes of action originated, in 1896, November 18, the Southern Railway Company had been in possession of this property and franchise as purchaser for more than two years.

Under the law providing for sale of the property levied on by the sheriff, he was *compelled* to deliver possession of the same to the purchaser, *immediately* after sale.

This would be *irreparable damage, and to cast a cloud upon complainant's title.*

This relief asked is not in violation of section 720, of the Revised Statutes.

It is to arrest the hand of this officer, in attempting to seize the property of complainant, illegally.

This officer is not the agent of these plaintiffs in the executions copied in the bill. He was directed what to do; and, what not to do. *If he could find property, belonging to the defendant in the execution, he was bound to seize it;* but the property he proposed to seize, was not "*owned by the defendant in 1898.*" There was a deed, duly registered, showing that it was the property of the Southern Railway Company. It was, at least, a *presumption,* that it was so owned, and there was a way, pointed out by the law, by which this title could have been tested. His proposition to *seize it, and deliver it to the plaintiffs in the execution, or purchasers,* was not in pursuance of his agency for the plaintiffs. It was a trespass, threatened, and one the court will enjoin in protection of its purchaser. (See Judge Simonton's opinion in 89 Fed. Rep., page 24; also, opinion of Judge Boyd, in the record, page 35.)

In so far as the standing of these *parties in court is concerned*, they are as much bound by the decrees of the circuit court, as the stockholders; or, the corporation. Whatever rights they have, came to them, through acts of the corporation. And, as the *corporation* is estopped, so are *these parties claiming by, under, and through it.*

The bill filed, praying for the injunction, may be a supplemental bill. If, however, treated as an original bill, it is ancillary, in its character, and, in aid of the original bill. It grows out of, and is dependent upon, the original bill. (Clark *vs.* Matthewson, 12 Peters' R., 120; Foster's Fed. Practice, 28-29, cited by Judge Simonton on page 28, 89 Fed. Rep., on the circuit, in a former case.)

This bill was filed after the decree of confirmation of sale, already referred to in this brief. It was to enjoin the sheriff, David R. Julian, *from seizing, and delivering into the hands of the purchaser, the Western North Carolina Railroad, and the franchises of the corporation*, under a proposed sale, to satisfy the two executions, already referred to, one for $15,000 in favor of Mrs. James, adm'x and the other, $5,000, in favor of Mrs. Howard, adm'x.

It was suggested, and is now, that this is too late, being after the decree.

As is shown by the extracts from the executions, the notices of sale, and the statute under which the sheriff was acting,—section 674 of the Code of North Carolina,—the whole proceeding was in defiance and contempt of the decrees of the court, entered in the foreclosure proceedings, in 1894, all set out in full, in the record.

Section 674, which is set out in full, in this brief, on a former page, provides, that the officer shall "immediately after such sale deliver to the purchaser, possession of all the corporate real property, connected with the franchises," etc. This is the law the sheriff referred to, when he said, in his notice, he would "sell agreeably to law."

As to the jurisdiction, we refer to the case of Root *vs.* Woolworth, 150 U. S. Rep., 401. It was held in that case, the late Justice Jackson delivering the opinion, to be ancillary to the original proceedings, and supplementary to the decree rendered therein.

It was an assertion of a right to carry into effect its own orders and decrees, by the court.

The following is quoted from the opinion by Circuit Judge Simonton, in his opinion already cited, 89 Fed. Rep.:

"The title held by the mortgagor passes, under the decree, to the purchaser, upon the consummation of the sale by the master's, or sheriff's, deed. As against all parties to the suit, the title is gone, and as the right to the possession, as against them, follows the title, it would be a useless and vexatious course to require the purchaser to obtain such possession by another suit. Such is not the course of procedure adopted by a court of equity."

This itself is a quotation from Justice Jackson, in 150 U. S., 401.

Further, says Justice Jackson, in this same case, 150 U. S. Rep., 401:

"The bill being ancillary to the original proceeding, * * * and supplementary to the decree, rendered therein, can be maintained without reference to the citizenship, or residence, of the parties" (page 413).

This whole subject is discussed in Root *vs.* Woolworth, *ibid.*, and it is conclusively shown there, by the justice, that the course pursued here, is the proper one.

The attention of the court is respectfully called to the opinion of Circuit Judge Simonton, 89 Fed. Rep., 24, upon the jurisdiction in this same case, the first time it came before the court in 1898. It shows upon its face what careful consideration the circuit judge gave to the facts of the case accurately stated, as they are.

So that the injunction was issued upon the bill, supplemental, to the original bill, to foreclose a mortgage, executed to the Central Trust Company, of New York, printed in the record, as before said.

As we say, this is a supplemental bill, or may be treated as an original bill, to remove a cloud from the title, cast upon property, bought by Southern Railway Company, at foreclosure sale, by decree of a circuit court.

It is also a bill, to protect the Southern Railway Company, in the enjoyment of property, bought, under a decree of foreclosure, and sale.

It is only in equity, that adequate relief can be had, in this proceeding; because, first, irreparable damage would be done, unless the officer was restrained from "*seizure of the property*" as he is *required* by the Code of North Carolina, to do. (See section 674, of the Code of North Carolina.) This section provides, that the officer shall, "*immediately* after such sale, deliver to the purchaser possession *of all the corporate real property connected with the franchise*," &c. (See notice of sale, printed in the bill, where respondent says, he will "sell agreeably to law," this property.)

Equity jurisdiction, also, is invoked in this case, to prevent a multiplicity of suits. There are other judgments against this old company, similar to these of James and Howard, and others. And, also, other actions, pending in this district against the Western North Carolina Railroad Company. (See transcripts; *Wehrman vs. Conklin*, 155 U. S. R., 314; pages 17, &c., of Record.) In *Central Trust Company, of New York, vs. W. N. C. R. R. Co.*, 89 Fed. Reporter, page 24, Judge Simonton shows that section 720, of Revised Statutes is not involved, nor violated.

On page 124 of the printed Record, as a part of the decree of confirmation of sale, is the following: "It is further ordered and decreed," that the special master make a deed to Southern Railway Company, conveying this "*railroad* and *property, franchise*, etc.," "*free from any and all equity of*

redemption, of the said Western N. C. R. R. Co., or, any one, claiming, by, under, or through it," except the prior mortgage, recited in the decree. This makes the Southern Railway Co. "*the absolute owner thereof.*" The owner of what? "*All and singular the railroad, equipment, property, and franchises, so, as aforesaid, sold* under the decree of this court." It is a sale and transfer of the *railroad and franchise;* not the *estate* of the Western N. C. R. R. Co., alone, but "the *property* and *franchises,*" themselves.

In the last paragraph of the same, there is a *further assurance*, proviso.

So that two years, before James and Howard were killed, under these decrees, deed, &c., the Southern Railway Co., was the "absolute owner" of the property and franchises.

The W. N. C. R. R. Co., had no possible interest or estate, in the *railroad*, or *franchises*, so sold.

There is no lien law in North Carolina, that gave Mrs. James, and Mrs. Howard, a lien upon a thing, the defendant, The W. N. C. R. R. Co., *did not have, at the time of the origin of their claims, the deaths of deceased.*

Then we see, they are cut off, because the decree says: "*Free from all and every equity of redemption* of the said W. N. C. R. R. Co., "*or any one claiming by, under, or through, it.*"

These people certainly claim "*by, under, and through*, the W. N. C. R. R. Co.," *because their judgments were obtained on account of something done, by the Western N. C. R. R. Co., as alleged, more than two years after the sale, under foreclosure.*"

Then, this is as much foreclosed, as the rights of stockholders. "The judgment of foreclosure is conclusive, against the stockholders," *and against anything, that the W. N. C. R. R. Co. could do, or, any right claimed, by any one, on account of anything, done by the W. N. C. R. R. Co. after sale.* (See Judge Simonton's opinion, page 29 Fed. Rep., vol. 89.)

See *deed of master*, as to *what was conveyed under these decrees, &c.* (page 154, Record).

In addition to authorities cited by Judge Simonton, see *Farmers' Loan & Trust Co. vs. Lake St. R. R. Co.*, page 51, 177 U. S. R., and, especially, pages 61 and 62.

It is well settled, that, for a sheriff to make, an "*excessive levy*" is actionable, by a defendant, in the execution (sec. 773, Mecham on Public Officers). "*It cannot be tolerated,*" says, Cooley, justice, "*that such a seizure shall go unrebuked*" (*Handy vs. Clifford*, 50 Mich., 355).

Here was *five millions of property levied on, and notice of purpose to seize "the entire property, corporate real," and deliver to the purchaser immediately after sale.*

A court of equity, is the only court, that *can* give adequate relief, in a case of this kind.

In this argument, we beg the *court to note the most important fact*, that the Southern Railway Company, a Virginia corporation, *purchased* the *Western North Carolina railroad, and franchises of the corporation*, and all of its other property, at a foreclosure sale, under a second mortgage, subject to a lien of the first mortgage, the Central Trust Company of New York, *being trustee in both mortgages.* This purchase was in fee.

This sale was duly confirmed, on the 22d day of August, 1894 (page 123, Record).

Under this decree, and by virtue of the deed, of the master, it is to be observed, the Southern Railway Company, became the absolute owner of the property, and franchises, of the corporation, sold; and, was in *sole possession* of the railroad, and franchises of the old company, and had been operating *the road for over two years, as sole owners, before the disaster*, out of which, resulted the death of James, the intestate of the respondent, James, admx.; and, of Howard, also.

The Western North Carolina Railroad Company, the old corporation, *at that time, had no interest, no estate of any kind or character, in the franchise;* or, *any other property of that old corporation*, which had been sold, and purchased, by the Southern Railway Company.

In the action brought by the admx. in the superior court of Rowan county, the State court, that is to say the James case, the *Southern Railway Company, was not a party.* The action was tried with James, admx., as sole plaintiff, and The Western North Carolina Railroad Company, *sole* defendant; same, as to Howard.

The contention on the part of the plaintiff, was, that the railroad was being operated by a lessee, under a valid lease, *made by authority of law*, and, that the lessor, that is to say, the Western North Carolina Railroad Company, was liable to plaintiff for the death of intestate, an engineer, the same caused by the negligence of the lessee, which lessee was in sole possession of, and solely operating, the railroad.

The contention of the defendant, that is to say, The Western North Carolina Railroad Company, was, that the old corporation was dissolved, for all purposes, but one, and that one was, its existence for three years, in which to wind up its affairs, the time fixed by statute. In addition to this, it was contended that the death of the intestate was caused by the negligence of a fellow-servant, to wit: the engineer in charge of the locomotive coming in collision, with the one driven by plaintiff's intestate. The trial court, the superior court, held that the old corporation was dissolved by the sale and conveyance made by the master, *as provided in section 697, of the Code of North Carolina*, and gave judgment for the defendant. From this judgment, the plaintiff appealed to the supreme court, which court overruled the court below, and directed that judgment be entered against the defendant, for the amount of the verdict, which was in favor of the plaintiff, upon the question of negligence.

The sole question, presented by the record, to the supreme court, upon appeal, was whether the corporation was dissolved. The court held it was not, and affirmed the judgment.

Section 697 provided, that, upon a sale of a corporation's property, like this, under foreclosure, or trust, the purchaser

ipso facto, by the sale, and conveyance, became a corporation.

It is, as follows:

"SEC. 697. If a sale be made under a deed of trust or mortgage executed by any corporation on all its works and property, and there be a conveyance pursuant thereto, such sale and conveyance shall pass to the purchaser at the sale, not only the works and property of the corporation as they were at the time of making the deed of trust or mortgage, but any works which the corporation may after that time, and before the sale, have constructed, and all other property of which it may be possessed at the time of the sale other than debts due to it. Upon such conveyance to the purchaser, the said corporation shall *ipso facto* be dissolved, and the said purchaser shall forthwith be a new corporation by any name which may be set forth in the said conveyance, or in any writing signed by him and recorded, in the same manner in which the conveyance be recorded."

This is a familiar statute, and was never construed, elsewhere, as in North Carolina.

"Laws allowing the purchasers at a foreclosure sale to form a new corporation, are not intended to prevent a sale or transfer to a corporation *already formed*, and *capable, under the laws of its creation*, of holding the corporate property and exercising the franchises, which pass to the purchaser by sale: (*People vs. Brooklyn, &c., Ry. Co.*, 87 N. Y., 75").

35 American State Reports, page 400, note.

It is to be noted that this statute, section 697, of the Code, is a valid statute; and provides that a sale and conveyance, *pass to the purchaser, not only the works and property of the corporation, as they were at the time of making the deed of trust, or mortgage, but any works which the corporation may, after that time, and before the sale, have constructed and all other property of which it may be possessed at the time of sale, other than debts due to it.*

There is no denial of the fact that the mortgage was valid, and conveyed the railroad, and all its property, including the franchises *of the corporation.* Nor is it denied, that, under this statute, and other laws of the State, the sale was a valid one, and that the purchaser bought the property mortgaged, *including all the franchises,* of the corporation.

This is so, notwithstanding the reply of the plaintiffs in the actions in the State court, on pages 71, 72, etc., of the Record, that the sale was a fraud, and "pretended."

Not one piece of evidence, not a scintilla, even, was offered at the trial to this effect. It was not contended for, in the superior court, nor even referred to in the supreme court. The only question was, whether, as provided in the latter clause of the statute, "such conveyance to the purchaser," the Southern Railway Company, "*ipso facto,*" dissolved the old corporation. No part of the statute was held invalid. It was only insisted that the failure of the purchaser to organize a new corporation, prevented the dissolution of the old. The superior court held the old corporation void, but was reversed by the supreme court of the State. The court failed to give any effect to the words of the statute, "*ipso facto,*"—"*by that fact, itself.*"

There was no question of negligence before the court, and none argued. The contention of the defendant was, that it was a dissolved corporation, that the engineers, James and Howard, were never in its service, at any time, that it had no power to hire the said engineers, or anyone else, its franchises, its railroad, and all of its property, having *over two years before the deaths of the said deceased James and Howard,* been purchased at the foreclosure sale, under the decrees of the circuit court of the United States, by the Southern Railway Company, a corporation of Virginia, created in that State, and operating the said road in North Carolina, according to law, and under the laws of comity.

The judgment appealed from, was, as appears on page 75 of the Record, reversed.

Further, and to restate the last few points, in the light of the statute, section 697 of the Code, copied already in this brief, there must be some one to take the place of the old corporation. There must be some corporation upon which the State may exercise its visitorial powers. In this connection, as said by Circuit Judge, Simonton, in the case several times referred to, Central Trust Company against Western North Carolina Railroad Company, 89 Fed. Rep., 24, 29, there was no pretense of any fraud or collusion, between the Central Trust Company and the Western North Carolina Railroad Company, and the purchaser, the Southern Railway Company. Nor was there the suggestion of evidence of any lease of the Western North Carolina Railroad Company to the Southern Railway Company.

The decree confirming the sale, is, in part, as follows:

"*And the court accepts the Southern Railway Company as the purchaser of all and singular, the railroad property and franchises, sold under the decree in this cause, and holds it obligated as such purchaser, to complete and fully to pay its said bid, and to comply with all the orders of this court heretofore entered, as hereafter, from time to time, to be entered by it, obligatory on such purchaser.*"

Every order, as provided, was complied with.

At this point we copy this part of the decree to show it was not final, for all purposes, and to show, also, the court *accepted the Southern Railway Company as purchaser, under its decree, solemnly entered.*

The title was in fee, executed to the complainant, the Southern Railway Company, by the master, acting under the decrees of the circuit court, *every decree and order* having been signed by the circuit court judges, in person, Hon. Nathan Goff, or Hon. Charles H. Simonton.

There must be some one, to take the place of the old corporation.

It is admitted, the Southern Railway Company, purchased the equity of redemption, at the foreclosure sale. Having

done this, what, may we ask, estate, had the Western North Carolina Railroad Company, in the property, franchises, &c.?

The only estate of the old corporation, in the same, that is to say, in the *railroad* and *franchises of the company, was an equity of redemption*, which was sold, and bought by the Southern Railway Company.

Then, at the time of the killing of James and Howard, admittedly, *employés of the Southern Railway Company*, the Western North Carolina Railroad Company, *had no property, of any kind, or character.* Nor, indeed, *had the company, had, for more than two years.*

James and Howard, were *not employed*, by the Western North Carolina Railroad Company, and *never had been.* They were servants of the Southern Railway Co., and employed, by that company, to operate one of its engines, being driven, on the railroad, purchased, under the decree of foreclosure, and sale, entered in the circuit court of the United States, in May, 1894.

In this case, as we have shown above, there was a corporation, already in existence, and it was unnecessary to organize any other. Indeed, no organization was necessary in any case, as the last clause was self-executing (87 N. Y. Rep., 75, already cited).

Section 697 of the Code, was enacted, for the purpose of supplying a corporation, to take the place of the one whose property was sold, which sale was supposed to have dissolved the old company.

There must be some one, to whom the State can look, for performance of the duties imposed by the sovereign, as a consideration for granting the franchise.

This is true, and, as the lord paramount, under the feudal system, looked to the freeholder for the performance of the feudal services, so does the sovereign, now look, to the holder of the franchise, for the performance of the duties imposed, when it was granted. It looks, we may say, to the franchise

itself, and in doing so, this performance is, by the person owning the franchise, as in this case, the Southern Railway Company.

This is a North Carolina franchise, owned by a person, of another State. The Southern Railway Company is a corporation, operating a railroad, under and by reason of the franchise, purchased, at the sale of the Western North Carolina railroad, under the decree of foreclosure and sale, passed by the circuit court of the United States, as disclosed by the record, in this suit.

The Southern Railway Company operates the *North Carolina railroad*, the property of *another* company, in North Carolina, but only by reason of the *ownership of the franchise of that company, for a term of years*. But for this, it could not operate it; and, but for *its ownership absolute, of the franchise of the old W. N. C. R. Co.*, it could not operate *it*. When the sovereign power grants a railroad charter, or, we may say, *any* charter, it does two things: It brings a person, a corporation, into existence; and then confers upon it, certain rights, privileges, sometimes, called liberties, but, always, franchises. With the *permission of the sovereign*, the corporation may dispose of its franchises, as it may, of any of its other property. But it cannot dispose of *itself*. So when the Western North Carolina Railroad Company, executed the first and second mortgages, the second, being a mortgage of its *equity of redemption*, and all the property, including its franchises, and there having been a foreclosure and sale, under that second mortgage, so far as *property was concerned*, the corporation had none left. In the face of this, it is contended, that, in satisfaction of a judgment, obtained in the State court, *three years after the corporation had lost all its property, including its franchises, upon an alleged cause of action, which did not arise until two years after the purchase of this property and franchise, the same property and franchises*, can be taken, by a process, issuing from the State court.

Justice Matthews, on page 619, vol. 112, U. S. Reports, in the case of *Memphis R. R. Co. vs. Commissioners*, says:

"The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders, or the purchasers at a foreclosure sale, the substantial rights intended to be secured. They acquire the ownership of the railroad and the property incident to it, and the franchise of maintaining and operating it as such; and the corporate existence is not essential to its use and enjoyment. All the franchises necessary or important to the beneficial use of the railroad could as well be exercised by natural persons. The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the corporators, while the powers and privileges, vested in and to be exercised by the corporate body as such, are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence, after the corporation has parted with all its property and all its franchises."

Cook on Corporations, pages 1798 and 2130. See cited cases by this author on same pages. Pages numbered at bottom.

In the brief, some importance is attached to the fact, that A. B. Andrews, verified the answer, in the actions for negligence, prosecuted in the State court. This was on account of section 667, of the Code of North Carolina, which gave to the old company, three (3) years' time, to wind up the business of the dissolved corporation. A. B. Andrews was the president of the company, before foreclosure sale.

Section 667 of the Code is as follows:

"All corporations, whose charters shall expire by their own limitation, or shall be annulled by forfeiture, or otherwise, shall nevertheless be continued bodies corporate for the term of three years, after the time when they would have been so dissolved, for the purpose of prosecuting and defending actions, by or against them, and to enable them gradually to settle, and close their concerns, etc., etc."

It was for this purpose the old president swore to the answer, in the State court. The law was so written. The three years had not expired, by eight (8) months.

At this point, we may further observe, that the petitioners insist, the Southern Railway Company, a Virginia corporation, could not purchase the franchise of the Western North Carolina Railroad Company, at the foreclosure sale, without express permission of the sovereign.

It is not denied, that the Western North Carolina Railroad Company had the right, the power, to mortgage its property, *including its franchise.* Under the laws of North Carolina, and its charter, the corporation was empowered to place as many mortgages, upon the same, as it saw fit. This being so, it is "obvious that legislative authority to mortgage the franchises of a corporation, carries with it an implied authority to make the mortgage *effective by bringing those franchises to a sale, and transferring them,* with the *tangible* property of the corporation, to the purchaser" (35 Amer. State Reports, page 398, note 2, citing *New Orleans, &c., R. R. Co. vs. Delamore,* 114 U. S., 501).

This being so, who could purchase? Any person could, not prohibited from doing so, by some law. Indeed, if any person or corporation in North Carolina could purchase, so could any person or corporation, of another State. It is not denied that the Southern Railway Company is capable of holding this property under a *lease.* The supreme court of North Carolina, in the *Logan case,* 116 N. C., has so decided. That is so by reason of the *power* conferred upon the *lessor corporation to lease its property.* It would not be a valid lease, however, unless the lessee was authorized to take the property under the lease. Out of what does this authority grow, or come? First, because the Virginia charter conferred upon the lessee the power to take; and, second, because of the laws of comity between the States. There is nothing in the laws of North Carolina which forbids, the purchase of the property, by a Virginia corporation. The

Southern Railway Company had the power to take under the lease. It has the power to purchase. A corporation created by one State can transact business in another State, by consent of the latter. That consent may be either express or implied. When implied, it is under the laws of comity. In this case, there being nothing to forbid the carrying on the business of the foreign corporation, in the laws of North Carolina, its consent is implied. The business of the foreign corporation, is that expressed in its charter; amongst other things and powers enumerated, in the same, is the one of authority to purchase, and operate, railroads in other States. Under this power, so conferred, by the State, creating the Southern Railway corporation, and by reason of this consent, so implied, by the State of North Carolina, even in the absence of any provision, in its laws, concerning the same, it has the power to purchase, and under that power, regardless, as we say, of the express power granted by the sections of the Code, cited, in the opinion of the circuit judge, did purchase, the franchise and other property, of the old corporation, as we have before shown.

Lafayette Ins. Co. vs. French, 18 How., 400, 407.
89 Fed. Rep., page 31.
13 Pet., 519.

The sections of the Code referred to are as follows: 671, 672, 674, and 675, vol. 1, Code of North Carolina, 265. Also, section 685, vol. 1, of the Code of North Carolina, which section we will copy in full in this brief, when we come to the argument of *liens*, together with section 1 of the act of March, 1879, brought forward, in the Code, being section 1255.

The power to mortgage is conferred by the charter of the Western North Carolina Railroad Company, reference to same, and quotation, to be found on page 126 of the Record.

Any citizen, any *individual*, had the right to purchase this property, at the foreclosure sale, whether a resident of this, or any other State.

New Orleans, &c., vs. Delamore, vol. 114, page 508, U. S. Reports.

Memphis Railroad Co. *vs.* Commissioners, 112 U. S. Rep,. 619.

Barcello *vs.* Hapgood, 118 N. Car. Rep., 728–729.

This is a matter, however, *only to be enquired into by the State* (*ibid*).

Under the laws of North Carolina, a corporation can sell, transfer, or mortgage its franchises, except, *that*, to be, and exist, as a corporation (Code of N. Car., sections 671, 673, 675, and 685).

With regard to the purchase, the word, *person*, is used; and, corporation is a *person*, under the fourteenth amendment.

"In the case of *Gulf, Colorado and Santa Fe Ry. Co. vs. Ellis*, 165 U. S. R., page 150, Mr. Justice Brewer, says: 'It is well settled that corporations are persons within the provisions of the fourteenth amendment of the Constitution of the United States (*Santa Clara County vs. So. Pac. R.*, 118 U. S., 394; *Pembina Mining Co. vs. Penn.*, 125 U. S., 181, 189; *Missouri Pac. R. vs. Mackey*, 127 U. S., 205; *Minn. & St. Louis Ry. vs. Herricks*, 127 U. S., 210; *Minn. & St. Louis Ry. vs. Beckwith*, 129 U. S., 26; *Charlotte & Columbia R. R. vs. Gibbes*, 142 U. S., 386; *Covington & Lexington Turnpike Co. vs. Sandford*, 164 U. S., 578). The rights and securities guaranteed to persons, by that instrument, cannot be disregarded, in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations, the equal protection of the law, than it has to individual citizens.'"

The following is paragraph four, subsection (a) of the charter of the Southern Railway Company, granted by the

State of Virginia, on the 20th of February, 1894. Acts of Assembly of Virginia, 1893–'94, chap. 302, p. 368:

"4. In addition to its other powers, such new corporation, shall have, and from time to time, as occasion arises, may exercise, the following powers, or any of them, namely:

"(a.) With the approval of a majority of its stockholders, given at a meeting, it may, from time to time, lease, use, operate, consolidate with, or purchase, or otherwise acquire, or be leased, used, operated by, or consolidated with, any railroad or transportation company, now or hereafter incorporated by the laws of the United States or of any of the States, thereof, or any one or more of such railroad or transportation companies, or any other railroad or transportation company or companies, which now are, or hereafter may be leased, or used, or operated by, or consolidated with, any one or more, of such railroad or transportation companies."

To say that the State lost its right of visitation and enforcement of forfeiture, for misuser and non-user, by reason of the purchase of the franchise and property of the Western North Carolina Railroad Corporation by the Southern Railway Company, is to fail to distinguish between the body corporate, and its property, a part of which, is its *franchise*. The sovereign exercises its right of visitation, and enforcement of forfeitures, upon the *franchise*, and upon the *person, owning the franchise, whether that person be a corporation, or a natural person.*

In this case, the Southern Railway Company, is the owner of the franchise, as it is of the railroad track, and cars, that run upon the track.

There can be no intelligent appreciation of the principles involved in this case, as long as, the well-defined distinction between the *franchise*, and the *corporation* is not observed.

As to the effect of permission, under the laws of comity, given a foreign corporation to do business in another State than that of its creation, etc., see Conn *vs.* Chicago, B. & Q. R. Co., 48 Fed. Rep., pages 177–180.

In this case are cited cases which support this view we present, and the latter cite cases from the Supreme Court of the United States. This needs no argument, as it has been established too long, by the decisions of this court.

It *is plain to be seen*, that the *real purpose*, in prosecuting these actions against the *old, dissolved* company, was, to *avoid a removal of the same to the United States circuit court.*

Indeed, after the actions were tried, other suits, by the same plaintiffs, for the *same cause of action*, were begun, and *stand now, for trial*, in the said court. There was no pretense that the Southern Railway Company was, or, is, insolvent.

This suggests the fact that it is said somewhere, in the briefs of petitioners, there is some antagonism between the State courts of North Carolina, and the Federal courts. This, as Judge Boyd says, in his opinion on the circuit, in this case, printed in the record, cannot be, if the courts of the State, and those of the Federal Government, will observe the laws of comity (Record, page 39).

The Federal courts and the State courts, exist under separate sovereignties, but in the same territory. The State court is a court in which the citizens of the State litigate, and adjust, their differences. The Federal courts are the common home of the citizens of different States. That department known as the judicial department, was the wisest provision in that Constitution, under which we live. The history of the Government shows this to be true.

In the case of Covell *vs.* Heyman, 111 U. S. R., page 182, Justice Matthews says:

"The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with, perhaps, no higher sanction than the utility which comes from concord; but between State courts, and those of the United States, it is something more. It is a principle of right and of law, and, therefore, of necessity. It leaves

nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they coexist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res*, is as much withdrawn, from the judicial power of the other, as if it had been carried physically, into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the court from which it issues."

Nothing can be found in the decisions of the Supreme Court of the United States, different from what Justice Matthews has said, in this case. There are a great many cases, which support the rule contended for.

Section 720 of the Revised Statutes has no relation to this case. It is not the process that is enjoined, but its abuse; the injunction, protects the property of respondent.

The property, and franchises, protected, were sold and conveyed to the purchaser, long before November, 1896, the date of the deaths of James and Howard.

From no possible standpoint, can the Southern Railway be anything, but *a purchaser of the property, and franchises.*

If the property is in possession of the Southern Railway Company, as such purchaser, being the absolute owner of the same, how can any suit against the mortgagor, upon an alleged cause of action, having its *origin two years and three months* after the foreclosure sale and date of the deed, affect the said purchaser's title?

In the Burnett case, relied on by petitioners (123 N. C. Rep.), the *claim originated* in 1894, he Burnett being a passenger, and injured by reason of the negligence of the railroad company, *at that time.*

The deed of trust was made in 1891, and the *foreclosure in 1897*, three years *after the claim originated.*

By reason of section 1255 of the Code of North Carolina this CLAIM, which arose in 1894, became a lien upon the property, superior to that of the mortgage, and, of course, was to be paid before the purchaser, at the foreclosure sale, in 1897, could acquire the property, absolutely, and unencumbered.

In the case at bar, the purchaser took the property and franchises unencumbered, because two years *before deaths of James and Howard.*

Here the sale was in 1894, and the deaths of James and Howard in 1896, November 18th, and as said, by the circuit court of appeals, Judge Simonton, "It would be monstrous to affirm, that, in spite of this, the railroad property, and its franchises, remained in the Western North Carolina Railroad Company, subject to its debts, INCURRED AFTER THE SALE.

And so it would; it would be treating the sale, admitted to be regular and valid, as a nullity. It would be an utter failure to give effect to the decrees, orders, etc., of the circuit court of the United States.

The validity of the judgments of the State court is not questioned, in this proceeding. It is the protection of the purchaser, in the use, and enjoyment, of property conveyed, by the decree of the court, solemnly entered, from seizure, by the sheriff, directed by process, in his hands, to sell property, *if such he could find,* in satisfaction of the same, *of the Western North Carolina Railroad Company,* owned by that company, *at the date of the judgment, or, we may say, at date of origin of the claims,* of James and Howard, KILLED IN 1896, TWO YEARS AND THREE MONTHS, AFTER the Southern Railway Company became the sole owner of the said property, to wit, the railroad and franchises of the Western North Carolina Railroad Company, mortgagor.

If the killing of the said James and Howard had been before sale, and before the decree, and master's deed, as in the Burnett case, then, the *property,* and *franchises,* would have been bound, under section 1255 of the Code.

But, *then it must be established, and amount ascertained, against the person*, having the property, and operating it, *under the franchise.*

Otherwise, if twenty years elapse, after the property was conveyed, sold to the Southern Railway Company, this same property, *could be taken, and sold, under final process*, for a debt of the Western North Carolina Railroad Company—a judgment growing out of a disaster, twenty years, also, after the sale, and deed.

To accomplish the end, aimed at, in taking, in this way, the property of the Southern Railway Company, for the debt of the Western North Carolina Railroad Company, incurred, over two years, after the consummation of the title to the same, by the Southern, would be *to nullify the foreclosure proceedings of 1894*, in the circuit court of the United States. It would be in disregard of the principles laid down by Justice Shiras, in Farmers' Loan & Trust Co. *vs.* Lake Street El. R. R. Co., 177 U. S., 61.

This deed was made by order of the court, and covered all the property, and franchises, involved in this suit, and WAS MORE THAN TWO YEARS, BEFORE, the alleged claims of James and Howard, ORIGINATED.

Then, at the time of the alleged negligent homicide, of James and Howard, in 1896, servants of the purchaser, and who, at no time, were the employés of the Western North Carolina Railroad Company, which had, in no way, consented to their being employed, (and which had no power to so consent,) by the said Southern Railway Company, the old Western North Carolina Railroad Company, corporation, *had no estate, of any kind, no interest of any kind*, in the Western North Carolina railroad, or said franchises.

In the face of this fact, it is contended here, by petitioners, that, this property, these franchises, can be extended, by, and under final process, issued, upon a judgment, entered against *the Western North Carolina Railroad Company*, two years after the said sale, and, execution of the deed, by the master, in satisfaction of the same.

In the first place, at the time of the judgments, the defendant, The Western North Carolina Railroad Company, HAD NO PROPERTY OF ANY KIND; not even, a FRANCHISE, except that, to be, and exist as a corporation (Memphis R. R. Co. *vs.* Coms., 112 U. S., 610).

It is maintained, that the defendant, was liable, as a lessor. The possession of the Southern Railway Company, was not that of lessee, but as PURCHASER AT A FORECLOSURE SALE.

How was the Western North Carolina Railroad Company any lessor?

It could not be, of this property. Because, the property, and franchises, were both in possession of the Southern Railway Co., as purchaser, under the decrees of the circuit court of the United States.

It has been suggested somewhere in the briefs of the petitioners, that the parties, plaintiff, in the actions in the State courts, are enjoined from issuing executions, on their judgments. This is not true. The injunction *extends only to the protection of the property, and franchises sold by the court,* to the Southern Railway Company. It is the abuse of the process, that is enjoined (page 42 of Record).

Up to this point, in the argument, what is said has been to show the court, what are the facts. The citations made have been to show the bearing of these facts, their importance, and how they relate to one another.

We propose now to show that the respondent, Southern Railway Company, is entitled to have the decree of the circuit court of appeals affirmed.

In the first place, we call the attention of the court to the opinion of Judge Boyd, on the circuit, filed December 19, 1901, to be found in the record on page 35,—also 112 Fed. Rep., page 471; and to that of Judge Simonton, in the record, page 202, delivering the opinion of the circuit court of appeals, affirming Judge Boyd's decree. This opinion of Judge Simonton, in Fed. Rep., 115, 956, is not the one referred to, so often in the statement of the facts, that being, in another

case, on the circuit, between the same parties, reported in 89 Fed. Rep., 24. We refer to these opinions, as containing the law, applicable to this case. We have established the fact that the Southern Railway Company was the absolute owner of the Western North Carolina railroad, and franchises of the corporation, by reason of its purchase of the same, at the foreclosure sale, in August, 1894, which sale, was made under the decrees of the circuit court, of the United States, as they appear in the record.

It also appears here, that, the Southern Railway Company, was in no way, a party to either one of the actions in the State court, for negligence, in which the judgments were obtained, one by Mrs. James, admx., for $15,000, and the other by Mrs. Howard, admx., for $5000. It is not denied that there are depending in the circuit court of the United States, for trial, now, in Statesville, in the western district of North Carolina, these same cases, James, admx., *vs.* Southern Railway Company, and Howard, admx., *vs.* Southern Railway Company, both based upon the same facts. It was said and argued in the circuit court of appeals, that it should be a right of a State to have its own courts try the cases that arise in its domain. That may be so, but here are cases in which one party is a citizen of Virginia, and the other, a citizen of North Carolina.

The complaint is, that our client removes its cases to the United States circuit court, for trial. This is so, if it can be done. This is the reason the two cases were brought against the old dissolved corporation. Everybody knows that. It was to avoid the Federal court.

In North Carolina, strange and new doctrines have crept *into the law* of negligence: for instance, a peculiar negligence known as "*continuing*" negligence, which, of course, destroys the defense of contributory negligence.

Greenlee *vs.* R. R., 122 N. C., 977.
Troxler *vs.* R. R., 124 N. C., 189.
Hardin *vs.* R. R., 129 N. C., 354.

It is a doctrine in North Carolina, that if contributory negligence is set up as a defense, there must be what is called a fourth issue, which is: "Notwithstanding the *contributory negligence*, could the defendant have avoided the injury?" Contributory negligence is made a defense by statute, and the burden of proving it, is upon the defendant. That is to say, notwithstanding this *perfect defense*, yet the plaintiff can recover.

Pickett *vs.* R. R., 117 N. C., 616.
Upton *vs.* R. R., 128 N. C., 173.

So it is in North Carolina, there is no such thing as proximate cause, as we understand it (Greenlee *vs.* R. R., 122 N. C., 977).

Another thing, it is held, that if a servant is injured, or killed, the presumption is the same, in his case, as in that of a passenger (Wright *vs.* R. R., 127 N. C., 222).

We are illustrating why it is, the foreign corporations remove their cases to the United States courts, if the jurisdictional facts can be made to appear. The Federal courts, which we have shown, are the common home, of citizens of different States, are treated as unfriendly courts. In the light of these facts, no one can blame a foreign corporation for removing its case to the circuit court of the United States. North Carolina is the only State in the Union where a lessor railroad company is held liable for the tort of the lessee, when the lease is made under a power granted in the charter, to lease the railroad and its franchises of the corporation. As before said, in the case of Arrowsmith, Judge Lurton has shown, that no other State has so held, nor can any case be found in the Federal jurisdiction to sustain this doctrine.

These things are not said, out of disrespect for the North Carolina Supreme court: indeed, far from it. It is only to show why our client, when it can do so, removes its cases to the Federal courts, for trial.

But, as we say, the Southern Railway Company was not a party, defendant, in either one of the cases, in which the State courts rendered the judgments, which the defendant, Sheriff Julian, is attempting to satisfy, by a sale of its property, under section 674, of the Code of North Carolina, already copied on page — of this brief. This is in direct violation of the fourteenth amendment to the Constitution of the United States.

The process is against the Western North Carolina Railroad Company; and directs the sheriff to extend the property of *that defendant*, in satisfaction of the executions, as *owned at the time of the docketing of the judgments, which was in 1898.* So we have here, the purchase of the property by the Southern Railway Company, in 1894, in August; the deaths of James and Howard in November, 1896, and the judgments in 1898, against the Western North Carolina Railroad Company, alone, a corporation, *with no property of any kind.*

There is not only no *due* process of law, but *none* at all, in so far as the Southern Railway Company is concerned. There were notices of sale of property owned by the Southern Railway Company, when the Western North Carolina Railroad Company was the *only defendant*, named in the *judgments, executions,* or *actions.*

Here was a plain statute, already quoted in this brief, section 674 of the Code, requiring the officer to "immediately, after sale, deliver to the purchaser, possession of all the corporate real property, connected with the franchise belonging to such corporation," etc.

Instead of obeying the statute, the sheriff, as will be seen in a former part of this brief, advertised the property and franchises *by name, the same that the Southern Railway Company had purchased in fee in 1894*, and which it had been operating as sole owner ever since, and is today operating. (See copies of executions and notices of sale in first part of this brief.)

Then what was the complainant to do? Here was a trespasser; of course the company could have sued him, but that was not adequate relief because he had levied upon all this property, and was prepared to deliver 300 miles of railroad into the hands of the purchaser "immediately after sale." It was irreparable damage. The foreclosure suit was still pending, and is now, as will appear by reference to a transcript marked A, filed in the papers, and which will explain itself. It is printed as an appendix to this brief.

There was a proceeding, by way of an intervention, on the part of the petitioner, one, Goodson, who claimed to be injured, and the same was tried at the November term of the circuit court of the United States, in Asheville, 1903. The plaintiff, or petitioner, obtained judgment for the amount set out in the transcript. This proceeding was under a like provision of a decree of confirmation of sale, to be found in the paragraph at the bottom of pages 114–115 of the Record.

How could *these claims* be liens, obligations, when the deaths of James and Howard, were two years after the sale of the property, and franchises? As it is, it is a claim,—judgments,—against the old Western North Carolina Railroad Company based on events transpiring two years after its property was sold to the Southern Railway Company, which had been adjudicated the absolute owner of the same in 1894.

In satisfaction of these judgments, the sheriff of Rowan county advertised for sale, as before said, 300 miles of railroad; although not authorized or empowered to do so, by the process in his hands, which only applied to the *property owned by the defendant, The Western North Carolina Railroad Company* in 1898, the date of the docketing of the judgments in Rowan county. This proceeding of the intervenor, Goodson, as said before, in the circuit court, was in a foreclosure suit, leave having been obtained to intervene, so that petitioner's damages could be ascertained, in accordance with the paragraph of the decree just referred to, to be

found on the said page of the record, 114. (See appendix to this brief.)

So, that this foreclosure is still pending, for the purposes, set out in said paragraph; and therefore, this supplemental bill, to render the decrees of sale, effective, and to secure to the purchaser, the enjoyment of the property, purchased under the same.

In this foreclosure proceeding, when did the jurisdiction of the circuit court attach? When the bill was filed, and process issued, on the 20th of April, 1894 (page 90 of the Record). The date of the decree of foreclosure was the 2d of May, 1894. At this time, this property and franchise came within the jurisdiction of the circuit court. (See page 108 of the Record.) When the bill of foreclosure was filed, in the circuit court of the United States, and the process issued, and the decree of foreclosure entered, this property was in the hands of the *court*, and no other court, State or Federal, could interfere in any way, with it, or the proceedings, in that suit. The rule has been declared to be of especial importance in its application to Federal and State courts (Farmers' Loan & Trust Co. *vs.* Lake St. Ry. Co., 177 U. S. R., 51-61.) This is an opinion of Justice Shiras. The justice says this jurisdiction cannot be defeated. Any process which seeks to interfere, says Justice Matthews, in Covell *vs.* Heyman, (111 U. S. R., page 182,) is void. As already said, in a former part of this brief, quoting from his opinion, "To attempt to seize it, by a foreign process, is *futile and void.*"

In the case of Harkrader *vs.* Wadley, 172 U. S. R., 148, Mr. Justice Shiras says:

"That the prohibition in section 720, does not apply, *when the jurisdiction of a Federal court has first attached.*"

Judge Boyd, quoting from his opinion, says that this is so in "ancillary bills," filed in the Federal court, *to enforce their own judgments and decrees, by preventing defeated*

parties from wresting property from plaintiffs, who, by final judgments, or decrees, are entitled to it (112 Fed. Rep., 477).

The leading case upon this question is Covell *vs.* Heyman, 111 U. S. R., 179, already cited, and quoted from, in this brief. This opinion of the court was written by Justice Matthews, one of the great lawyers of his day. Indeed, since this decision, we thought the principles, laid down then, had become so firmly fixed, that no intelligent lawyer could be found to contend to the contrary.

Said Justice Matthews in this case:

"The point of the decision in Freeman *vs.* Howe, *supra*, is that when property is taken and held under process, mesne or final, of a court of the United States, it is in the custody of the law and within the exclusive jurisdiction of the court from which the process was issued for the purpose of the writ; that the possession of the officer cannot be disturbed by process from any State court, because to disturb that possession would be to invade the jurisdiction of the court by whose command it is held, and to violate the law which that jurisdiction is appointed to administer; that any person, not a party to the suit or judgment, whose property has been wrongfully, but under color of process taken and withheld, may prosecute, by ancillary proceedings, in the court whence the process issued, his remedy for restitution of the property or its proceeds while remaining in the control of that court; but that all other remedies to which he may be entitled, against officers or parties, not involving the withdrawal of the property or its proceeds from the custody of the officer and the jurisdiction of the court, he may pursue in any tribunal, State or Federal, having jurisdiction over the parties and the subject-matter. And, *vice versa*, the same principle protects the possession of property while thus held, by process issuing from State courts, against any disturbance under process of the courts of the United States; excepting, of course, those cases wherein the latter exercise jurisdiction for the purpose of enforcing the supremacy of the Constitution and laws of the United States.

"That which cannot be done by final process is equally out of reach of original or mesne process."

Covell *vs.* Heyman was an action, by which the State court of Michigan took from the United States marshal certain personal property, which, it was alleged, the marshal had wrongfully seized, under a writ of execution, issued upon a judgment of the circuit court, of the United States, in Michigan.

At this point, we call the attention of the court to the case of Phelps *et al. vs.* Mutual Reserve Fund Life Association, 112 Fed. Rep., 453. In this case, sixth circuit court of appeals, Judge Lurton delivered the opinion, and all the cases upon this question, involving the laws of comity between the courts, are cited, and commented on. There can be no question as to the correctness of the position we take. This property and franchise came within the jurisdiction of the circuit court, when the foreclosure proceeding was begun, and this court will retain it to the end. Any process foreign to this is void. This property being in the hands of the court, or its purchaser, how, may we ask, can the decrees of the circuit court of the United States, the decree of foreclosure and sale, and confirmation of sale, be made effective, unless by the injunctive process of the court, in view of the facts, in the record, called to the attention of the court, in this brief?

There was but one other remedy, and that was the action of trespass, *vi et armis*. This was inadequate, because section 674, under which the sheriff advertised the sale, and was acting, required him to deliver the corporate possession immediately after sale of the railroad to the purchaser, that is to say, 300 miles of railroad, the said sheriff was to deliver *immediately* after sale. Section 674 is copied in a former part of this brief, to which reference has several times been made.

The Federal courts of equity will not entertain a bill for relief where a plain, adequate and complete remedy exists at law, *but this remedy must be at law in the Federal courts.*

The existence of such a remedy at law in a State court, will not oust the Federal courts of equity, of jurisdiction.

The judiciary act of 1789, is section 723 of the Revised Statutes. It provides that "suits in equity shall not be sustained in either of the courts of the United States, in any case where a plain, adequate and complete remedy may be had *at law*."

The adequate, complete remedy *at law*, is the test of the equitable jurisdiction of the Federal courts.

Payne vs. Hook, 7 Wall., 425.
McConihay vs. Wright, 121 U. S., 201, 206.
National Surety Co. vs. State Bank, 120 Fed. Rep., 595; and cases cited.

This act of 1789 is merely declaratory. It made no alteration whatever in the rules of equity on the subject of legal remedies. It merely expressed the law which had governed proceedings in equity ever since their adoption in the courts of England.

Whitehead vs. Shattuck, 138 U. S., 146, 150.

But when the Federal courts of equity refuse to entertain a bill where the complainant has a complete remedy "at law," *what* courts of law are contemplated? Does this mean that if an adequate and complete remedy exist at law in either a *State* or a *Federal court*, equity is without jurisdiction, or does it mean that unless there exists an adequate and complete remedy at law, in the *Federal* court, equity will take jurisdiction?

There must be an adequate remedy on the law side of the *Federal court*, or the equity court will possess jurisdiction.

The rule is stated by Mr. Justice Gray, in *Buzzard vs. Houston*, 119 U. S., 352, in the following words:

"Accordingly, a suit in equity to enforce a legal right can be brought only when the court can give more complete and effectual relief, in kind or in degree, on the *equity side* than on the *common-law side*."

"Parties who are entitled to resort to the Federal courts, to have their rights adjudicated, cannot be turned away because *State laws* may give them an adequate remedy in a *State* court" (*Hoey vs. Coleman*, 46 F. R., 223).

The jurisdiction of the Federal courts of equity is *uniform* throughout the United States.

Payne vs. Hook, 7 Wall., 425.
Kerby vs. Lake Shore, etc., R. R. Co., 120 U. S., 128.
Hull vs. Dills, 19 F. R., 657.

It cannot, therefore, in the nature of things, be *varied* by State laws or statutes. This phase of the question has been repeatedly considered by the courts. In *Payne vs. Hook*, 7 Wall., 429, the contention of the defendant was stated by Mr. Justice Davis to be this:

"In other words, as the complainant, were she a citizen of Missouri, could obtain redress of her grievances only through the local court of probate, she has no better or different rights because she happens to be a citizen of Virginia."

But the court was of opinion that, as a citizen of one State has the constitutional right to sue a citizen of another State in the Federal court, instead of resorting to a State tribunal, the right would be worth nothing, if the court was limited in its power to afford a suitable measure of redress.

A plain and adequate remedy existed in the State courts of law. While the State opened wide the door for a suit at law, it restricted the suit to the probate courts. This limitation, as we have seen, was held *to be inoperative as to those whose citizenship entitled them to sue in the Federal court* whether they sued on the law or the equity side, was determined by the adequacy of the relief which the *Federal court* could grant on its law side. *The State court and the State statute were left entirely out of consideration.*

And so it was determined in *McConihay vs. Wright*, 121 U. S., 201. That was a case of a bill in the Federal court,

sitting in West Virginia, to quiet title to lands in that State.

A demurrer was interposed on the ground that complainant had an adequate remedy at law, inasmuch as a statute of that State, gave the right to maintain such actions, and to persons out of possession the right to maintain ejectment. But the demurrer was overruled on the ground that—

"No change in State legislation, giving, in like cases, a remedy by action at law, can of itself curtail the jurisdiction in equity of the courts of the United States. The adequate remedy at law which is the test of equitable jurisdiction in these courts, is that which existed when the judiciary act of 1789 was adopted, *unless subsequently changed by Congress.*"

And Davis, justice, said in *Payne vs. Hook*, 7 Wall., 425–430, that—

"The equity jurisdiction of the Federal courts is subject to neither limitation or restraint by State legislation, and is *uniform* throughout the different States of the Union. * * * The absence of a complete and adequate remedy at law is the only test of equity jurisdiction, and the application of this principle to a particular case must depend upon the character of the case, as disclosed in the pleadings."

The State and Federal courts are foreign jurisdictions to each other. A plea in a State court of "former suit pending," is not good when the suit is pending in a Federal court.

Latham vs. Chaffee, 7 Fed. Rep., 583.
Stanton vs. Embry, 93 U. S., 544.
Gordon vs. Gilfoil, 99 U. S., 178.
Ins. Co. vs. Barnes, 96 U. S., 593.
Sharon vs. Hill, 22 Fed. Rep., 30.

The truth is, a court of equity can do anything, to protect a purchaser like the Southern Railway Company, purchasing from the court under its decrees, as heretofore set out. But upon this point enough has already been said.

The case of Railroad *vs.* Burnett is cited in the brief of petitioners, to show that these judgments of James and Howard are liens upon this road and franchise. We are unable to see any similarity between this case and that under section 1255 of the Code of North Carolina. That section is as follows:

"Mortgages of corporate companies upon their property, or earnings, whether in bonds or otherwise, hereafter issued, shall not have power to exempt the property, or earnings, of such incorporations from execution, for the satisfaction of any judgment obtained in courts of the State against such incorporation, for labor performed, nor for material furnished such incorporation, nor for torts committed by such incorporation, its agents, or employees, whereby any person is killed, or any person, or property, injured, any clause, or clauses, in such mortgage, to the contrary, notwithstanding."

Section 685 of the Code of North Carolina is as follows:

"Any corporation may convey lands and all other property, which is transferable by deed, by deed of bargain and sale, and signed by the president, or presiding member or trustee, and two other members, of the corporation, and attested by witnesses. But any conveyance of its property, *whether absolutely, or upon condition, in trust, or by way of mortgage, executed by any corporation*, shall be void, and of no effect as to the creditors of said corporation, existing prior to, and at the time of the execution of said deed, *and as to torts* committed by such corporation, its agents or employees, *prior to, or at the time of the execution of said deed: Provided*, said creditors, or persons injured, or their representatives shall commence proceedings, or actions to enforce their claims against said corporation, within sixty days after the registration of said deed, as required by law."

These two sections are to be read, and construed together, and the case of Burnett is to be read in the light of the facts of that case. When so read, it has no application to the case at bar, whatever.

In the Burnett case, 123 N. C. Rep., the *claim originated* in 1894, he, Burnett, being a passenger, and injured, by reason of the negligence of the railroad company, *at that time.*

The deed of trust was made, in 1891, and the *foreclosure in 1897*, three years *after the claim originated.*

By reason of section 1255 of the Code of North Carolina, this CLAIM, which arose in 1894, became a lien upon the property, superior to that of the mortgage, and of course, was to be paid, before the purchaser, at the foreclosure sale, in 1897, could acquire the property, absolutely, and unencumbered.

In the case at bar, the purchaser took the property, and franchises, *unencumbered, because two years, before deaths of James and Howard.* This, we repeat.

Here the sale was in 1894, and the deaths of James and Howard in 1896, November 18th, and as said, by the circuit court of appeals, Judge Simonton, "It would be monstrous to affirm, that, in spite of this, the railroad property, and its franchises, remained in the Western North Carolina Railroad Company, subject to its debts, INCURRED AFTER THE SALE.

And so it would; it would be treating the sale, admitted to be regular and valid, as a nullity. It would be an utter failure to give effect to the decrees, orders, etc., of the circuit court of the United States.

The validity of the judgments of the State court is not questioned, in this proceeding. It is the protection of the *purchaser*, in the use, and enjoyment, of *property conveyed, by the decree of the court*, solemnly entered, from seizure, by the sheriff, directed by process, in his hands, to sell property, *if such he could find*, in satisfaction of the same, *of the Western*

North Carolina Railroad Company, owned by that company at the date of the judgment, or, we may say, at date of origin of the claims, of James and Howard, KILLED IN 1896, TWO YEARS AND THREE MONTHS, AFTER the Southern Railway Company became the sole owner of the said property, to wit, the railroad and franchises of the Western North Carolina Railroad Company, mortgagor.

If, at the time of the deaths of James and Howard, the Western North Carolina Railroad Company *had been operating the railroad, under its franchise, and the said James and Howard had been servants of the road, or passengers*, as in the Burnett case, and if, after that time there had been a foreclosure sale, etc., then the purchaser would have taken, with notice of the claims of James and Howard, because of section 1255. Also, as here, there is a provision in the decree of foreclosure and sale that such claims are to be paid before the purchaser can take a perfect title, the same already quoted in this brief, and to be found at the bottom of page 114, of the printed Record, and continued on page 115.

It can certainly have no application to these judgments, because the sale under foreclosure, was over *two years before the deaths of James and Howard*. At that time, in two decrees, the circuit court of the United States had adjudicated that the Southern Railway Company was the absolute owner, free from all incumbrances, and liens, of this property, the franchises and railroad, and all other property of the Western North Carolina Railroad Company.

Or to make another illustration, suppose in the actions depending in the United States circuit court, now, for these same deaths, against the Southern Railway Company, there should be a recovery, James and Howard being the servants of the said company, *never in fact*, having been employed by the Western North Carolina Railroad Company, *at any time*, the Southern Railway Company, corporation, would not be allowed to say, the railroad was under mortgage, which was precedent to the judgment liens; why? Because of this

statute, 1255. It might be, the company, owning and operating the railroad was insolvent. That would make no difference, the property would be bound under the statute. It is a good and useful law.

These actions are on the docket for trial, in the Federal court, and will never be tried, as long as the plaintiffs can avoid it, because any lawyer knows the two engineers, are fellow-servants, under the decisions of this court, the deaths of James and Howard having been caused by the negligence of the engineer, on the engine colliding with the one James and Howard were driving. This was before the repeal of the law of fellow-servants. (B. & O. R. R. Co. *vs.* Baugh, 149 U. S., and Ross case, in 112 U. S.).

As before said, the franchise, and the railroad property, go together, and the amount of the claim, the damages, *must be established*, against the *corporation operating the road, under the franchise, as in* this case, the Southern Railway Company.

If the supreme court of North Carolina had adverted to the difference between a franchise *of the corporators*, and *of the corporation*, there would have been no such suit, as the one at bar.

It is impossible, to have an understanding of the principles here involved, unless the distinction referred to, and so well pointed out, by Justice Matthews, in the Memphis Railroad case, in 112 U. S. R., copied in this brief, is observed. This is elementary, and we might say, the very A B C, of the law. The franchise to exist, as a corporation, is one thing; and, the franchise, of the corporation, another. All of the franchises of the corporation, according to law, were sold, and bought by the Southern Railway Company, in 1894. How then could the Western North Carolina railroad corporation, run a railroad, employ operatives, etc.? It could not, because, after August 1894, the mortgagor had no power to operate a railroad. Why? Because, the franchise cannot be separated from the corporate property sold with it. It is suggested, in the James case, 121 N. C. Rep.,

that the Southern was running the road at the time of James' and Howard's homicide, as agent of the Western North Carolina Railroad Company. How could this be, when two decrees of the circuit court of the United States, one of foreclosure, and the other, of confirmation of sale, two years before these deaths, had adjudicated the Southern Railway Company, the absolute owner of both, franchises and corporate property, sold?

The court never could have arrived at such a conclusion, if this distinction, we mention, had been noticed. By whom were James and Howard, deceased, and intestates of petitioners, employed? It is not denied, but that both, were, by the Southern Railway Company. As before said, *they never had been employed, at any time*, by the Western North Carolina Railroad Company. There is no reason for further arguing such a proposition as this.

It is contended that, in the case of James, adm'x, *vs.* Western North Carolina Railroad Company, it was held, a lessor was liable, in an action against it, for the tort of the lessee, in sole possession of the railroad, and operating it, under a lease made under a power given, and granted, in its charter, by the State, the lessee's charter granting the right of the lessee, to take and operate, the same, under the franchise, so leased, also, by the authority of the State.

It would not be noticed here, but for the fact that such is the contention in this case, as we see it in the brief. In the first place, where is there any evidence of a lease here? The Southern Railway Company claims under no lease, and no effort was made, at any time, in all this litigation, to show there was a lease.

Indeed, on the contrary, how, if there be a lease, by authority, can the Southern Railway Company be lessee, and agent, both?

In cases where a railroad corporation undertakes to lease its property, *with no power*, the courts hold the alleged lessee, is an agent.

We have already called the attention of the court in this brief to the case of Arrowsmith, 57 Fed. Rep., and Judge Lurton's opinion, in which he shows that no lessor, by authority of law, has ever been held liable for the tort of the lessee, by any court, in the United States, Federal or State.

We do not believe any case can be found, except in North Carolina, to that effect. No decision of the United States Supreme Court, to that effect, can be found.

And yet, in the case of Hardin *vs.* Railroad, 129 N. C., 354, it is held, that the lessor, in a case of that kind, is liable. Many cases are cited by the learned justice, in support of that contention, all found in a note, in vol. 20, (new series) of American and English Railroad Cases.

In that case, there was a dissenting opinion, by Justice Cook, who showed clearly, that, not one of the cases relied on, was where the State had granted to the lessor in its charter, or otherwise, *the power to lease.*

The defendant, in that case, was The North Carolina Railroad Company, which had leased its railroad and franchises, to the Southern Railway Company, *by authority of law.* The plaintiff was a servant of the lessee.

Every action growing out of a disaster, on the line of that railroad, more than 200 miles long, if it be one of importance, when more than $2000 is demanded, is brought *solely* against the lessor. There has never been any attempt to show, in any case in North Carolina, so holding, the principle upon which it was so decided.

In the case of Hardin, we believe all of them are cited. There *can be* no argument made, to sustain these decisions.

In saying what we do, it is not intended to manifest any disrespect for the North Carolina supreme court. We think it a learned court, and one that justly stands high, in the other States of the Union.

We trust to be permitted to say, that, in our humble judgment, when the lessor's property is taken, for the tort of the Southern Railway Company, lessee, the latter being no party

to the action, upon a simple allegation in the complaint, that the lessor is so liable, with no power to even employ a lawyer, when its franchise is leased with the permission of the State, with no power to hire a servant of any kind to operate the road, etc., etc., is taking and depriving the lessor of its property, in satisfying the judgment, without due process of law.

We have been betrayed into making these remarks, because of the contention suggested in the briefs, of petitioners, based on James' case.

The preparation of this argument, has been in the light of that of Judge Simonton, as contained in his opinion in the case, filed in the circuit court of appeals, to be found in the record, and also in 115 Fed. Rep., 956–963. We believe he has exhausted the subject in his opinion, to which we call the attention of the court.

On page 962, of the vol. 115, Judge Simonton says:

"The act of the sheriff in levying on this property, clearly was illegal. And, inasmuchas under the law of North Carolina, it would have been his duty to have put the purchaser into immediate possession," (section 674, quoted in this brief) "and into the enjoyment and use of all the franchises of the company, and so work irreparable injury to the Southern Railway Company, the owner, in possession, the court, having the right, and authority, to do so, was bound to issue its writ of injunction (Marshall *vs.* Holmes, 141 U. S., 596; Barrow *vs.* Hunton, 99 U. S., 80)."

We can do no better than quote this paragraph from Judge Simonton's opinion, as a proper close of this argument.

We think the decree of the circuit court of appeals should be affirmed.

CHARLES PRICE,
Solicitor for Respondents.

WILLIAM A. HENDERSON,
FABIUS H. BUSBEE,
Of Counsel.

APPENDIX.

UNITED STATES OF AMERICA,
Western District of North Carolina.

IN THE CIRCUIT COURT.

CENTRAL TRUST COMPANY OF NEW YORK and W. P. CLYDE ET AL.
vs.
RICHMOND & DANVILLE RAILROAD COMPANY and RICHMOND & WEST POINT TERMINAL AND WAREHOUSE COMPANY.

PETITION OF MARCUS J. GOODSON.

To the honorable the circuit court of the United States:

The petition of Marcus J. Goodson respectfully showeth:

1st. That prior to the 15th day of June, 1892, and before the times hereinafter mentioned, the Richmond and Danville Railroad Company, a corporation organized and existing under the laws of the State of Virginia, had, through purchase or acquisition of stock, or by written lease or operating contract, obtained the possession and control of the franchises and property of the Atlanta & Charlotte Air Line Railroad Company, a corporation duly chartered and existing under the laws of the States of Georgia, South Carolina and North Carolina, whose line of railroad extended from the city of Charlotte in the State of North Carolina, passing through the State of South Carolina, to the city of Atlanta in the State of Georgia; and were, on and prior to said dates, by reason of such acquisition, written lease or operating contract operating said line of railroad with the cars, locomotives and other appliances and appurtenances thereto belonging, in the carrying on of a general railroad business.

2nd. That on said 15th day of June, or about that time, an order was made by this court, in the above entitled cause, appointing Frederick W. Huidekoper, of Meadville, Pennsylvania, and Reuben Foster of Baltimore, Maryland, temporary receivers of all the property of the said Richmond & Danville Railroad Company, with all and singular the rights, powers, titles, duties and obligations set forth in said order of appointment and in a supplemental order thereafter entered in said cause; and on the 16th day of August, 1892, by a further order entered by this court in said cause, the said Frederick W. Huidekoper and Reuben Foster were made permanent receivers, and invested with all and singular, the rights, powers, titles, duties and obligations set forth in the original and said supplemental order of appointment. That afterwards, on or about the first day of August 1893, Samuel Spenser was, by this court, appointed with said Frederick W. Huidekoper and Reuben Foster, as receiver of said Richmond & Danville Railroad Company and its property in the above entitled action, and he and they together continued to act as such receivers until the — day of December, 1894, when by an order of the circuit court of the United States, for the district of Maryland, the said Frederick W. Huidekoper, and Reuben Foster, were relieved as such receivers and discharged as such, and the said Samuel Spenser then became, is now and has continuously since remained sole receiver of the Richmond & Danville Company and its property.

3rd. That from and after the appointment of said receivers, as above alleged and continuously up to and including the 11th day of July, 1893, and at the times hereinafter mentioned, they, the said receivers, by virtue of the authority given to them by said orders of appointment, became and were possessed of the property, rights, privileges, franchises and appurtenances belonging and appertaining to the Atlanta & Charlotte Air Line Railroad Company, and used and operated the same, the said line of railroad, with the cars, locomotives, and all the other appliances and appurtenances thereto belonging in carrying on a general railroad business.

4th. That the petitioner, on the 11th day of July, 1893, at the time of the committing of the grievances hereinafter mentioned, was in the employment of said receivers, as a switchman upon said line of railroad, between Charlotte,

North Carolina, and Atlanta, Georgia; and it was the duty of the said receivers to provide safe appliances, machinery and means to enable the petitioner to safely do and perform the work required of him as such switchman of said receivers; to provide suitable and safe places to do and perform the work required of him as such switchman; to provide other servants and employees, sufficient in number, skillful and competent for the performance of the work required and necessary to be done; to provide such suitable, sufficient, safe, secure and good cars, ladders, tracks, side tracks, switches, yards and yard room as would enable the petitioner to safely perform the work required by his said employment.

5th. That yet the said receivers, not regarding their duty, conducted themselves as such receivers so carelessly, negligently and unskillfully in this behalf that they did not provide safe appliances, machinery and means to enable the petitioner to safely do and perform the work required to be done by him as such switchman, and they did not provide other servants and employees, sufficient in number, skillful and competent, for the performance of the work required to be done; nor did they use due care in the selection of said servants and employees as they did select, but negligently and carelessly employed incompetent and unskillful servants and employees and an insufficient number of such other servants and employees, and did not provide suitable, sufficient, secure and good cars, ladders, tracks, side tracks, switches, yards, and yard room, as would have enabled the petitioner to safely perform the work required by his said employment; and conducted themselves so carelessly, negligently and unskillfully in this behalf that they as such receivers placed one of their cars upon a side track near to and close beside the main track of said railroad and only a few inches, less than one foot, from the same, and so that a train or car passing upon said main track would be obstructed by the same, and so that one climbing upon a ladder attached to a car passing upon said main track, as was required of switchmen in their employment, would be knocked and thrown therefrom by being struck and thrown against said car on said side track; and they, said receivers, knowingly and so carelessly, negligently and unskillfully permitted said car to so remain and be upon said side track near to and close beside said main

track; and conducted themselves so carelessly, negligently and unskillfully as such receivers, in this behalf, that they, while said car was so carelessly, negligently and unskillfully placed and standing upon said side track so near to the main track as was well known to them, but unknown to the petitioner, rapidly backed and pushed a car upon which it was the duty of the petitioner by reason of his said employment to be, at an unusual and dangerous rate of speed, by means of an engine attached thereto, down and upon said main track and beyond said car standing upon said side track. 6th. That for want of due care and attention and because of the carelessness negligence and unskillfulness in that behalf and in the matters and things above and below alleged on said date July 11th, 1893 on the line of said railroad aforesaid, at or near Spartanburg South Carolina, and while the said appliances, machinery, means, cars, ladders, employees track side track and yards were in the use and service of the said receivers upon about and in connection with said railroad and while the petitioner was engaged in said work and in the duties of his said employment as switchman for said receivers and while he was climbing upon one of said cars by means of a ladder attached thereto which car was then being rapidly backed and pushed at an unusual and dangerous rate of speed by means of an engine attached thereto upon the main track of said railroad and near to the car standing aforesaid upon said side track, he, being at the time wholly unaware of danger and without any fault or negligence on his part, was violently knocked and thrown against said car so standing on said side track and thence with great violence thrown down upon the ground, whereby he received great bodily injury and was made sick, sore, lame and disabled and his spine permanently injured, his back and side lacerated and bruised, one or more of his ribs broken and his testicles so affected inflamed and diseased that it became necessary that they should be removed and the same were removed, and whereby he was caused and suffered great pain and whereby he was caused to lose his vitality and manhood and to become permanently an invalid, and whereby he was then and there hindered from attending to any business whatever and permanently disabled from doing any kind of labor, and has ever since remained and continued sick, sore, lame and disabled and will perma-

nently remain so, and was put to great expense in trying to be cured and suffered and still continues to suffer great pain of body and mind by means of such injury to his damage forty thousand dollars ($40,000).

Wherefore, your petitioner prays this honorable court that it cause to be paid to him said sum of forty thousand dollars ($40,000) as damages so sustained by him as aforesaid, said sum to be so paid by said receiver out of the funds now in his hands as such receiver and which may hereafter come into his hands as such receiver; that if the court deem proper it cause to be enquired into by proper issues submitted to a jury, the truth of the matters alleged in this petition: and that it grant to said petitioner any other or further relief to which he may be entitled, and any relief which to this honorable court may seem just in the premises.

(Signed) MOORE & MOORE,
Attorneys for the Petitioners.

UNITED STATES OF AMERICA, }
Western District of North Carolina. }

Marcus J. Goodson, being duly sworn, deposes and says: I am the Marcus J. Goodson the petitioner named in the foregoing petition and have heard said petition read and know the contents thereof and the same is true of my own knowledge, except as to the matters therein stated on information and belief and as to those matters, I believe it to be true.

(Signed) M. J. GOODSON.

Sworn to and subscribed before me this day.

Witness my hand and official seal on this the 4th day of April, 1896.

R. O. PATTERSON,
Clerk U. S. Courts,
By A. S. PATTERSON, *Deputy.* [SEAL.]

Filed April 4, 1896.

R. O. PATTERSON, *Clerk.*

A true copy.
Test: W. S. HYAMS,
Clerk U. S. Circuit Court,
at Asheville, North Carolina.

[Endorsed:] No. —. United States of America, western district of North Carolina. In the circuit court at Asheville. Central Trust Co. of New York *et al.* against Richmond & Danville Railroad *et al.* Petition of Marcus J. Goodson. W. S. Hyams, clerk.

UNITED STATES OF AMERICA,
Western District of North Carolina.

IN THE CIRCUIT COURT.

CENTRAL TRUST COMPANY OF NEW YORK and W. P. CLYDE ET AL.
vs.
RICHMOND & DANVILLE RAILROAD COMPANY and RICHMOND AND WEST POINT TERMINAL AND WAREHOUSE COMPANY.

AMENDED PETITION OF MARCUS J. GOODSON.

Marcus J. Goodson amending his petition by consent of the parties hereto further respectfully showeth:

I.

That on the 19th day of June 1893, being at the time entirely inexperienced as a switchman, only twenty-two years of age and entirely without knowledge of the duties required of him as a switchman, as was well known to said receivers was employed as such switchman by said receivers, as stated in his original petition, said employment being hazardous and dangerous, as was also well known to said receivers, who though so knowing of the hazardous and dangerous character of the duties required of such switchman failed and neglected to give him notice thereof, and failed and neglected to give him such instruction concerning such employment and such hazards and dangers, as was reasonably required of them, because of the youth and inexperience and want of capacity of the petitioner.

II.

That as the petitioner is advised and believes it was incumbent upon such receivers and it was a part of the duties devolved upon them to promulgate proper and sufficient rules and regulations for the working, operation and management of their said yard, tracks, side tracks, switches, cars, engines and other machinery and appliances used in connection with or upon the said yard, tracks, side tracks, switches, &c., and to make known the same to its switchmen, particularly the petitioner, employed thereat for their safety and protection; but as he is informed and believes and now avers, the said receivers in violation of their said duties did not promulgate any such proper and sufficient rules and regulations for the working operation and management of said yard, tracks, side tracks, switches, cars engines and other machinery and appliances used on or in connection therewith.

III.

That further amending said petition he inserts between the word "railroad" in the sixth line from the top of the third page thereon, in the word "between" in said line and words "at Spartanburg, South Carolina" and by inserting between the word "selection" in the sixth line from the bottom of the third page and the word "of" in said line, the words "and retention in their employ" and by inserting between the word "employ" in the fourth line from the bottom of the third page and word "incompetent" in said line, the words "and retained in their employ."

(Signed) MOORE & MOORE,
Attorneys for the Petitioner.

STATE OF SOUTH CAROLINA,
County of Spartanburg.

Marcus J. Goodson, being duly sworn by me—W. H. Darden, a notary public in and for the county of Spartanburg, State of South Carolina at my office in the city of Spartanburg in said State says that he has heard read the foregoing amended petition and knows the contents thereof; that as to these matters therein stated of his own knowledge

he knows it to be true; that as to those matters therein stated on information and belief, he believes it to be true.

(Signed) MARCUS J. GOODSON.

Subscribed and sworn to before me this the 31st day of March, 1897.

In witness whereof I have hereunto set my hand and official seal.

(Signed) W. H. DARDEN,
Notary Public for the County of Spartanburg & State of South Carolina.

STATE OF SOUTH CAROLINA, }
County of Spartanburg. }

I, T. R. Trimmier, clerk of the circuit court in and for the county and State aforesaid, do hereby certify that W. H. Darden whose genuine signature appears to the foregoing instrument hereto attached was, at the time of signing the same, a notary public duly commissioned under the laws of this State, and that his official acts as such are entitled to full faith and credit.

Witness my hand and seal of said court at Spartanburg court house, South Carolina, this 31st day of March A. D. 189–.

(Signed) T. R. TRIMMIER,
[SEAL.] *Clerk of Circuit Court.*

Filed in this office Mar. 30, 1897.

C. B. MOORE, *Clerk.*

A true copy.

{ Seal United States Circuit Court, Western Dist. of N. C., at Asheville. }

Test: W. S. HYAMS,
Clerk U. S. Circuit Court.

[Endorsed:] No. —. United States of America, western district of North Carolina. In the circuit court at Asheville. Central Trust Co. of New York, *et al.* against Richmond & Danville Railroad Co., *et al.* Amended petition of Marcus J. Goodson. W. S. Hyams, clerk.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA, FOURTH CIRCUIT, AT ASHEVILLE.

CENTRAL TRUST COMPANY OF NEW YORK ET AL.
vs.
RICHMOND AND DANVILLE RAILROAD COMPANY AND WEST POINT TERMINAL COMPANY.

JUDGMENT IN FAVOR OF MARCUS J. GOODSON, INTERVENOR, AGAINST SOUTHERN RAILWAY COMPANY.

This action having been brought on for trial at this term of the court, before his honor James E. Boyd, U. S. judge, and a jury, and having been tried and the jury having found the issues in favor of the plaintiff and against the defendant, and having assessed his damages at six hundred and fifty ($650) dollars,

It is now upon motion of John Gary Evans and Charles A. Moore, Esqrs., attorneys for Marcus J. Goodson, intervenor and petitioner, adjudged that he, the said Marcus J. Goodson, have and recover of the Southern Railway Company, said company having been made a party defendant herein and having answered the petition, the said Southern Railway Company being represented in this proceeding by W. A. Henderson, A. H. Price and Thomas S. Rollins, Esqrs., its attorneys of record herein, the sum of six hundred and fifty ($650) dollars, together with his costs in this behalf incurred to be taxed by the clerk of this court.

(Signed) JAS. E. BOYD,
U. S. Judge.

Filed in this office Nov. 18, 1903.
W. S. HYAMS, *Clerk.*

A true copy.
Test: W. S. HYAMS,
Clerk U. S. Circuit Court.

[Endorsed:] No. —. United States of America, western district of North Carolina. In the circuit court at Asheville. Central Trust Co. of New York *et al.* against Richmond & Danville Railroad *et al.* Judgment. W. S. Hyams, clerk.

Petitioner's cause of action by way of intervention, in the suit of Central Trust Company *vs.* Richmond & Danville Railroad Company.

Petition, amendment to the same, and judgment, in accordance with decree of foreclosure.

Cases decided by the supreme court of North Carolina, upon what is known as Last Clear Chance, Automatic Couplers, Assumption of Risk, Liability of Lessor, Presumption of Negligence, where servant injured, and injury to trespasser:

"Last Clear Chance."

Gunter *vs.* Wicker,	85,	p. 310.
Pickett *vs.* R. R.,	117,	616.
Fulp *vs.* R. R.,	120,	575.
Arrowood *vs.* R. R.,	126,	629.
Hood *vs.* R. R.,	129,	305.
Deens *vs.* R. R.,	107,	686.
Upton *vs.* R. R.,	128,	173.

"Automatic Couplers."

Greenlee *vs.* R. R.,	122,	p. 977.
Troxler *vs.* R. R.,	124,	189.
Hardin *vs.* R. R.,	129,	354.
Elmore *vs.* R. R.,	132,	865.

"Assumption of Risk."

Cogdell *vs.* R. R.,	129,	p. 398.
Coley *vs.* R. R.,	129,	407.
Thomas *vs.* R. R.,	129,	393.

"Liability of Lessor."

Logan *vs.* R. R.,	116,	p. 940.
Hardin *vs.* R. R.,	129,	354.

All cases reviewed in Hardin case, and doctrine reaffirmed.

"PRESUMPTION OF NEGLIGENCE."

Wright *vs.* R. R., 127, p. 222.
Marcon *vs.* R. R., 126, 200.
Kinney *vs.* R. R., 122, 964.

"INJURY TO TRESPASSER."

Pierce *vs.* R. R., 124, p. 63.
Perry *vs.* R. R., 128, 47.
Cook *vs.* R. R., 128, 333.

The foregoing are some of the cases referred to in the brief, showing, as we think, the strange doctrines, that have crept into the law of negligence, in North Carolina.

Supreme Court of the United States.

No. 139.—October Term, 1903.

David R. Julian, Sheriff; Mrs. Clemye James, Administratrix of W. A. James, and Mrs. Fannie E. Howard, Administratrix of John H. A. Howard, Petitioners,
vs.
The Central Trust Company and The Southern Railway Company.

On writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[February 23, 1904.]

On May 2, 1894, a decree was entered in the Circuit Court of the United States for the Western District of North Carolina foreclosing a second mortgage of the Western North Carolina Railroad Company to the Central Trust Company of New York, trustee. The property was subject to a first mortgage to the same trustee, which was not in default. The decree provided:

"The purchaser or purchasers of the property herein decreed to be sold," the Western North Carolina Railroad and its franchises, "shall be invested with and shall hold, possess and enjoy the said mortgaged premises and property herein decreed to be sold, and all the rights, privileges and franchises, appertaining thereto, as fully and completely as the Western North Carolina Railroad now holds and enjoys, or has heretofore held and enjoyed the same; and further, the said purchaser or purchasers "shall have and be entitled to hold the said railroad and property discharged of and from the lien of the mortgage foreclosed, in this suit, and from the claims of the parties to this suit or any of them, except the first consolidated mortgage of September 1st, 1884."

In pursuance of this decree the Southern Railway Company, a corporation of the State of Virginia, became the purchaser. On August 22, 1894, the sale was confirmed, the decree of confirmation providing, among other things:

"It is further ordered and decreed that the special master is hereby authorized and directed, on the request of said purchaser, to sign, seal, execute, acknowledge and deliver a proper deed of conveyance to the said Southern Railway Company, conveying to it, all and singular, the railroad, equipment, property and franchises so as aforesaid, sold under the decree of this court, free from any and all equity of redemption of the said Western North Carolina Railroad Company, or any one claiming by, under or through it, except the prior mortgage recited in such decree. Upon the delivery of such conveyance by the special master the said South-

ern Railway Company shall fully possess and be invested with all of the estate, right, title and interest in, to and of such railroad, equipment, property and franchises so sold under the decree of this court as the absolute owner thereof, to have and to hold the same to it and its successors and assigns forever.

"On August 31, 1894, on exhibition of the deed executed and delivered by the special master herein ordered, the defendant company is authorized, directed and required forthwith to deliver over to the said Southern Railway Company the possession of all and singular the railroad and property described *in and conveyed by such deed.*

"It is also further ordered that by way of further assurance and confirmation of title to such Southern Railway Company of the property so by it purchased under the decree of this court, the said The Western North Carolina Railroad Company, by its proper officers and under its corporate seal, and the Central Trust Company of New York, trustee, shall, upon request of said Southern Railway Company, sign, seal, execute, acknowledge and deliver to said Southern Railway Company all proper deeds of conveyance, transfer, release and further assurance of all the railroad property and franchises so as aforesaid sold under the decree of this court and embraced in the deed of the special master, so as fully and completely to transfer to and invest in the said Southern Railway Company the full, legal and equitable title to all such railroad, property and franchises sold or intended to be sold under the decree of this court."

Afterwards the master conveyed to the Southern Railway Company—

"All and singular the railroad of the said Western North Carolina Railroad Company in the State of North Carolina, extending from Salisbury, in Rowan County, to and through Statesville, in Iredell County, to Asheville, on or near the French Broad River, in Buncombe County; thence along French Broad River to Paint Rock in Madison County, and also from said Asheville westward to the Tennessee River at or near the mouth of the Nantahala River, and thence westward to Murphy in Cherokee County; and all real estate now owned or acquired for the purpose of said railroad, including all station, depot or other grounds held and used in connection therewith; and all rails, railway tracks, sidings, switches, bridges, fences, turn-tables, water tanks, viaducts, culverts, superstructures, passenger and other depots, station and freight houses, machine shops, buildings, fixtures, rolling stock, equipment, machinery, tools and implements whatsoever, now owned or acquired for the purposes or business of the said Western North Carolina Railroad Company in connection with the said railroad, and all the franchises, rights, privileges, easements, income, earnings and profits of the said Western North Carolina Railroad Company, connected with, issuing from or relating to the said above-described railroad.

"The foregoing properties, real, personal, choses in action and franchises, being embraced in the lien of the second mortgage of the Western North Carolina Railroad Company, executed September 2, 1884, and being sold in foreclosure of the same.

"A more full and particular description of the property intended to be conveyed by this instrument being contained in said decree of the 5th of May, 1894, to which reference is hereby made, together with all the corporate estate, equity of redemption, rights, privileges, immunities and

franchises of said Western North Carolina Railroad Company, and all the tolls, fares, freights, rents, income, issues and profits of the said railroad, and all interests and claims and demands of every nature and description, and all the reversion and reversions, remainder and remainders thereof, including all the said mortgaged premises and property in said decree directed to be sold, at any time owned or acquired by, and now in the possession of, said Western North Carolina Railroad Company."

The deed of purchase was duly recorded, and in August, 1894, the purchaser took possession of the railroad property and has ever since been in possession of the road operating it as owner.

On March 20, 1897, Mrs. James, as administratrix of her deceased husband, W. A. James, brought an action in the Superior Court of Rowan County, North Carolina, against the Western North Carolina Railroad Company for damages for the wrongful killing of her husband. The Southern Railway Company was the employer of the deceased and he was killed in its service while acting as a locomotive engineer. In the trial court a judgment was rendered in favor of the railroad company. On appeal the judgment was reversed and the cause remanded to the Superior Court, with directions to enter a judgment for the damages assessed in favor of the administratrix. (*James* v. *Railroad*, 121 N. C. 523.) Judgment was entered accordingly against the Western North Carolina Railroad Company for $15,000 on February 21, 1898.

On the same day that the James suit was begun, March 20, 1897, Fannie E. Howard, as administratrix of her husband, John H. A. Howard, deceased, commenced an action in the Superior Court to recover of the Western North Carolina Railroad Company damages sustained in the death, by wrongful act, of her husband, who was killed at the same time with James, being a fireman in the employ of the Southern Railway Company, and recovered damages in the sum of five thousand dollars on February 21, 1898. To neither of these suits was the Southern Railway Company made a party defendant. After the recovery of these judgments, Mrs. James and Mrs. Howard caused executions to be issued from the Superior Court of Rowan County and placed the same in the hands of D. R. Julian, sheriff, who proceeded to levy the same upon the property as belonging to the Western North Carolina Railroad Company, to wit:

"The Western North Carolina Railroad Company, existing in the State of North Carolina, including its corporate franchises, rights, privileges, immunities, easements and appurtenances of every kind appertaining, belonging to, or in any wise connected therewith, or issuing out of and relating to the said The Western North Carolina Railroad Company, together with all of its property in the State of North Carolina, and including its roadbed and right of way, its real estate acquired and owned for railroad purposes, its stations, depots, grounds, its railway tracks, switches, sidings, bridges, fences, turn-tables, water tanks, viaducts, culverts, superstructures, passenger, freight and other houses, ma-

chine shops, buildings and fixtures—the said railroad extending from the town of Salisbury through Statesville, Newtown, Hickory, Morganton, Marian, Asheville to Paint Rock in Madison County, and from Asheville westward by way of Waynesville to Murphy in Cherokee County—reference being had for a further description of said road and its property, rights and franchises to the charter of the said road and the amendments thereto enacted from time to time by the general assembly of North Carolina."

The sheriff advertised the property levied upon for sale, whereupon the Central Trust Company of New York and the Southern Railway Company filed a supplemental bill in the foreclosure proceeding, making the sheriff party defendant, seeking to quiet the title to the property and franchise purchased at the foreclosure sale and to enjoin the sale of the same to satisfy the judgments rendered in the State courts against the Western North Carolina Railroad Company. In the answer of the sheriff and of the administratrices of James and Howard issue was taken upon the right of the Circuit Court to entertain the bill or grant an injunction, and among other things it was averred:

"3. That these respondents deny the truth of the allegations contained in the third section of the supplemental bill of complaint, and while they admit that the Southern Railway Company took a deed from the master purporting to convey the said franchises and property subject to the lien of the first-mortgage bonds theretofore issued by the said company, they aver that the Southern Railway Company, being at the time of said sale not a resident corporation of the State of North Carolina, and not subject to visitation of said State, but attempting to do business therein by comity, was not allowed or authorized by the laws of North Carolina to purchase, or hold, or operate the Western North Carolina Railroad, or to own its franchise and property without becoming a domestic corporation, and that, by virtue of certain laws enacted by the legislature of North Carolina at its session of 1879, being chapter 10 of the Laws, of 1879, re-enacted in the Code of North Carolina as section 1255, no mortgage of the Western North Carolina Railroad Company, thereafter issued, had the legal effect of exempting the property or earnings of said company from execution for the satisfaction of any judgment obtained in the courts of said State against said company for torts thereafter committed by said company, its agents or employees, whereby any person should be killed, or any person or property injured, 'any clause or clauses in such mortgage to the contrary notwithstanding,' both the first mortgage bonds subject to which the sale of the franchise and property of said company purporting, under the decree referred to in the bill of complaint, to have been sold, and the second mortgage bonds, for default in payment of the interest on which the decree of foreclosure was entered, appear from said record (Exhibit A to said bill of complaint) to have been issued long after the enactment of said statute in the year 1871, and said statute, since its enactment in 1871, has been the law of the State of North Carolina, in contemplation of which all railroad companies created by and organized under the laws of said State have issued all mortgage bonds, the said statute, as these respondents are advised, informed and believe, having entered into and formed a part of every mortgage bond issued by

any railroad corporation operating under the laws of North Carolina since its enactment in 1871.

"But these respondents deny the truth of the allegation 'that, at the time of their death (referring to the death of W. A. James and John H. A. Howard) the Western North Carolina Railroad Company had no interest in the Western North Carolina Railroad, or the franchises, nor had it any interest or estate in said railroad or franchise of any kind or nature whatsoever since the 22d day of August, 1894, the day the Southern Railway Company took possession of said railroad;' and these respondents aver that the Supreme Court of North Corolina, the highest appellate court of said State, held and adjudged, in the year A. D. 1898, in actions pending therein on appeal, and in which these respondents, respectively, were plaintiffs, and the said The Western North Carolina Railroad Company was defendant, that the said Western North Carolina Railroad Company was still an existing corporation, liable to be sued in the courts of said State, and that the said judgments in favor of these respondents, respectively, and against the Western North Carolina Railroad Company, constituted liens upon the franchise and property of the company, superior to the liens of the said first mortgage bonds or the said second mortgage bonds mentioned in the said foreclosure suit, and these respondents are advised, informed and believe that the courts of the United States are bound to follow and adopt the construction given by the highest appellate court of North Carolina in construing its own constitution and its own laws. And these respondents are advised, informed and believe that, though the Southern Railway Company had assumed the right to operate the Western North Carolina Railroad, and had employed the intestates of these respondents as engineer and fireman, when they were killed by the negligence of said Southern Railway Company, that the Supreme Court of North Carolina had held and adjudged in the said actions brought by these respondents against the Western North Carolina Railroad Company, and wherein they recovered the judgments in pursuance of which executions have issued, as alleged in the bill of complaint, that the said The Western North Carolina Railroad Company was answerable for the torts of the Southern Railway Company, and for any damages to its employees caused by the negligence of said Southern Railway Company in operating said railroad."

Upon hearing upon the bill, answer and testimony a decree was entered in favor of the Central Trust Company and the Southern Railway Company and an injunction granted against the proposed sale of the property levied upon. From this decree an appeal was taken to the Circuit Court of Appeals, from whose judgment affirming the decree of the Circuit Court (115 Fed. Rep. 956) a writ of certiorari to this court was granted.

Mr. Justice DAY, after making the foregoing statement, delivered the opinion of the Court.

The title of the Southern Railway Company to the franchise and property of the Western North Carolina Railroad Company would seem to be plain, unless there is something in the North Carolina statutes or judicial determinations which prevents the foreclosure proceedings from having

effect to pass the title. A railroad company in North Carolina has full authority to mortgage its franchises and property. (Code of N. C. sec. 1957.) This power was also given by the charter of the Western North Carolina Railroad Company. By the foreclosure proceedings, the title of the Western North Carolina Railroad Company to its franchise and property, except its mere right to be a corporation, was sold and the title confirmed in the purchaser. By the law of North Carolina the title to mortgaged premises is in the mortgagee. The Central Trust Company, the trustee under the first and second mortgages, was a party to the foreclosure proceedings. It is estopped to dispute the effect of the decree, sale and confirmation, clothing the Southern Railway Company with the full title to the property and franchise to operate a railroad which had theretofore belonged to the Western North Carolina Railroad Company From this record and a consideration of the litigation that has arisen in the attempt to collect the James and Howard judgments, it is evident that a conflict exists between the views of the Federal courts and the Supreme Court of North Carolina, as to the effect of the foreclosure proceedings to relieve the property purchased at the sale from levy and execution to satisfy the James and Howard judgments. Such differences, always to be deprecated, should be approached in a spirit of fairness and comity with a view to preventing conflicts of jurisdiction detrimental to the rights of parties and to the respect and authority due judicial tribunals. The decision relied upon as justifying the sheriff in the levy of execution and sale of the property formerly belonging to the Western North Carolina Railroad Company is *James* v. *Railroad Co.*, reported in 121 N. C. 523, in which case it was held that the sale of the railroad company's property upon the foreclosure of the second mortgage did not extinguish the corporate existence of the company nor release it from liability to the public for the manner in which the property was operated. Further, that the sale under the decree in the Circuit Court of the United States foreclosing the second mortgage did not under secs. 697, 698 of the Code of North Carolina make the purchaser a domestic corporation, and that, in order to have the effect to dissolve the mortgagor corporation as provided in sec. 697 of the code, another corporation must be provided as contemplated in sec. 1936 of the code, to take its place and to assume and discharge the obligations to the public growing out of the franchise, and until that is done the old corporation will continue to exist. Speaking of secs. 697 and 698 of the North Carolina Code the learned judge, delivering the opinion, said:

"These sections were passed in 1872, and we think should be considered in connection with section 701, which was passed in 1879, and sections 1936 and 2005 referred to in section 701.

"If this be the correct reading of these sections of the code, it would seem that while section 697 does say that these facts, *ipso facto*, dissolved the corporation, another corporation must be provided, as in section 1936 of the code, to take its place before it is dissolved; that there must always

be a corporation in existence liable to the public for the duties and obligations assumed by the grantee for the privileges conferred in the grant of the franchise and that the old corporation must continue to exist until this is done; and that when the new corporation is formed it will be a domestic corporation. It cannot be that the legislature ever intended, by this general legislation, to create a foreign corporation here, when it could not do so by positive and direct enactment, (119 N. C. 918, Judge Dick's opinion in *Bradley* v. *Railroad*, published in the appendix.) By this view of the case all the interests of the parties may be harmonized. The 'Southern,' the purchaser of the equity of redemption of the 'Western,' stands in the shoes of that company. The Southern is in effect the mortgagor in its relations to the 'Central Trust Company of New York,' the mortgagee of the first mortgage, and being in possession of the road, its property and franchise, has the right to run and operate the same. But the old corporation, still in existence, is liable for damages caused by the maladministration of the Southern," which it allows to run and operate the road. But the property of this road, which the 'Southern' is allowed to use, will be held liable to the public for damages. (*Charlotte* v. *Railroad Co.*, 4 L. R. A. 135; *Brunswick Gas Co.* v. *United States Gas Co.*, 35 A. M. St. Rep. 385, and note on page 390.)

"It therefore follows that, in our opinion, the court below erred in its ruling upon the third issue. This ruling is reversed, and judgment should be entered for the plaintiff according to the verdict of the jury." (*James* v. *Railroad Company*, 121 N. C. 523–528, 529.)

This decision of the highest court of the State was made after the rights of the Southern Railway Company, whatever they may be, had accrued in the property and franchise of the Western North Carolina Railroad Company, and, while entitled to the highest respect and consideration, is not conclusive upon this court in determining the rights secured to the purchaser under the decree of foreclosure in the Federal court. (*Burgess* v. *Seligman*, 107 U. S. 20.)

If the North Carolina Supreme Court can be taken to have held that the property purchased by the Southern Railway Company at the judicial sale continued liable for debts thereafter accruing against the Western North Carolina Railroad Company, we are constrained to dissent from such conclusion. Under sec. 697, North Carolina Code, it is provided that the sale under a deed of trust or mortgage shall pass not only the works and property of a corporation and those acquired after the mortgage and before the sale, but all other property of which it may be possessed at the time of the sale other than debts due it, and "upon such conveyance to the purchaser the said corporation shall, *ipso facto*, be dissolved, and the said purchaser shall forthwith be a new corporation by any name which may be set forth in the said conveyance, or in any writing signed by him, recorded in the same manner in which the conveyance shall be recorded." Section 698 provides that the corporation created by or in consequence of such sale and conveyance shall succeed to all such franchises, rights and privileges, and perform all such duties as would have

been or should have been performed by the first corporation, but for such sale and conveyance, save only that the corporation so created shall not be entitled to the debts due to the first corporation, and shall not be liable for any debts or claims against the first corporation which may not be expressly assumed in the contract of purchase; nor shall the property, franchise or profits of such new corporation be exempt from taxation. This, with other provisions of sec. 668, indicate an intention to clothe the purchaser with all the property of the old corporation, including the franchise to conduct and operate a railroad, freed from all debts or obligations of the old corporation.

But these sections, it is said in the James case, must be read in connection with sec. 701 and secs. 1936 and 2005, referred to in sec. 701. They are set forth in the margin.*

*SEC. 701. This chapter, unless otherwise declared herein, or in the chapter entitled railroads and telegraphs, shall apply to all corporations, whether created by special act of assembly, by letters of agreement under this chapter, or by the chapter entitled railroads and telegraphs. And this chapter and the chapter on railroads and telegraphs, so far as the same are applicable to railroad corporations, shall govern and control anything in the special act of assembly to the contrary notwithstanding, unless in the act of the general assembly creating the corporation the section or sections of this chapter, and of the chapter entitled "Railroad and Telegraph Companies, intended to be repealed, shall be specially referred to by number, and as such specially repealed."

SEC. 1936. There shall be a board of six directors and a president of every corporation formed under this chapter, to manage its affairs; and said directors and president shall be chosen annually by a majority of the votes of the stockholders voting at such election, in such manner as may be prescribed in the by-laws of the corporation, and they may and shall continue in office until others are elected in their places. In the election of directors and president each stockholder shall be entitled to one vote personally or by proxy on every share held by him thirty days previous to any such election, and vacancies in the board of directors shall be filled in such manner as shall be prescribed by the by-laws of the corporation. The inspectors of the first election of directors shall be appointed by the board of directors named in the articles of association. No person shall be a director or president unless he shall be a stockholder owning stock absolutely in his own right and qualified to vote for directors at the election at which he shall be chosen; and at every election of directors the books and papers of such company shall be exhibited to the meeting if a majority of the stockholders present shall require it. And whenever the purchaser or purchasers of real estate, track and fixtures of any railroad corporation which has heretofore been sold or may be hereafter sold by virtue of any mortgage executed by such corporation or execution issued upon any judgment or decree of any court shall acquire title to the same in the manner prescribed by law.

SEC. 2005. When any railroad corporation shall be dissolved, or its property sold and conveyed under any execution, deed of trust, mortgage or other conveyance, the owner or purchaser shall constitute a new corporation, and the property, franchise and profits of said new corporation shall be taxed as other like property, franchise and profits are rated.

And it is said, as the result of these provisions that, unless the purchaser shall organize a new domestic corporation to take the place of the old corporation the property continues liable, though in the hands of the purchaser, upon a cause of action asserted against the old corporation for the conduct of the new owner, and this in actions to which the purchaser is not a party, and whose knowledge of the suit and judgment may come with the seizure of the property to satisfy the judgment. For, it is said, "there must always be a corporation in existence liable to the public for the duties and liabilities assumed by the grantee for the privileges conferred in the grant of the franchise." This reasoning, it seems to us, assumes that the franchise to operate the road did not pass by the sale, unless such new domestic corporation is organized. As we have seen, the North Carolina statutes authorize the conveyance by mortgage of the property and the franchise to use and operate it. The decree of foreclosure undertakes to sell and the confirmation to secure the purchaser in the use and enjoyment of the property. The power given to mortgage the franchise of the corporation must necessarily include the power to bring it to sale with the property to make the sale effectual as a means of transferring the right to use the thing conveyed. (*New Orleans Railroad Co.* v. *Delaware*, 114 U. S. 501.)

It is true the right to be a corporation is not sold. By the statute the corporation is declared to be dissolved by the sale, and under other sections of the North Carolina code its affairs are to be wound up. But the franchise to operate and use the property has passed at the sale, and must have done so to make the purchase of any value. This principle, recognizing the distinction between the mere right or franchise to be a corporation and the franchise of maintaining and operating the railroad, was distinctly pointed out by Mr. Justice Matthews in *Memphis R. R. Co.* v. *Commissioners*, (112 U. S. 819):

"The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders, or the purchasers at a foreclosure sale, the substantial rights intended to be secured. They acquire the ownership of the railroad and the property incident to it, and the franchise of maintaining and operating it as such; and the corporate existence is not essential to its use and enjoyment. All the franchises necessary or important to the beneficial use of the railroad could as well be exercised by natural persons. The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the corporators, while the powers and privileges, vested in and to be exercised by the corporate body as such, are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence, after the corporation has parted with all its property and all its franchises."

It is true the sections of the North Carolina code herewith given clothe the purchaser with the right and privilege of organizing a corporation to operate the purchased property, but we find no requirement that he shall do so. The language of the last paragraph of sec. 1936 is "such purchaser or purchasers may associate with him or them any number of persons, and make and acknowledge and file articles of association as prescribed in this chapter; such purchaser or purchasers and their associates shall thereupon be a new corporation, with all the powers, privileges and franchise, and be subject to all the provisions of this chapter." This confers a privilege, but does not prevent the purchaser from transferring the property to a company already formed and authorized to purchase and operate a railroad. (*People* v. *Brooklyn &c. Ry. Co.*, 89 N. Y. 75.)

The Southern Railway Company was authorized by its charter, among other things, to purchase or otherwise acquire the property of any railroad company organized under the laws of another State. We have been cited to no statute of the State of North Carolina forbidding the purchase of a railroad at foreclosure sale by a corporation of another State. It is said that the State requires a domestic corporation organized under and subject to its laws to become the purchaser of a railroad under the North Carolina statutes already cited. But the Southern Railway Company in purchasing a franchise granted by the State of North Carolina and undertaking to operate a railroad within the State, is subject to regulation by the law of the State. (*Runyan* v. *Lessee of Carter*, 14 Peters, 122; *Christian Union* v. *Yount*, 101 U. S. 352–354.) This principle is not qualified because the right of removal of suits for diverse citizenship still exists, as was held in *Southern Ry.* v. *Allison*, (190 U. S. 326.) It is urged that the Supreme Court of North Carolina, by a course of decisions antedating the mortgage and foreclosure, had established the rule of law contended for as to the continuing liability of a railroad corporation, unless a domestic corporation is organized to own and operate the property. We have examined these cases and do not find such to be the case. The Supreme Court of North Carolina had held a lessor liable for the conduct and management of the lessee, and in *Pierce* v. *Railroad of North Carolina*, (124 N. C. 83,) decided in March, 1899, that court said:

"The motion to dismiss the complaint and for judgment of nonsuit appears from brief of defendants' counsel to be intended to raise again the question whether the lessor company, The North Carolina Railroad Company, the defendant herein, is liable for all acts done by the lessee in the operation of the road, as was held in *Logan* v. *Railroad*, (116 N. C. 940,) but why the counsel should feel encouraged to believe that this court will retire from the position it has taken upon the question, we are not advised. We have perceived no lack of soundness of reasoning therein. The decision in Logan's case was made after full deliberation and with full appreciation and careful discussion of the im-

portant principles now again called in question, and it was held that a railroad company cannot escape its responsibility for negligence by leasing its road to another company, unless its charter or a subsequent act of the legislature specially exempts it from liability in such case, and it was made in an action to which the appellant herein was the party raising the question. The same proposition has been theretofore laid down by Smith, C. J., in *Aycock* v. *Railroad*, (89 N. C., at page 330, with cases there cited,) and Logan's case upon this point has been expressly cited and sustained in *Tilet* v. *Railroad*, (118 N. C., at page 1043;) *James* v. *Railroad*, (121 N. C., page 528;) *Benton* v. *Railroad*, (122 N. C. 1007, decided May 24, last,) and *Norton* v. *Railroad*, same volume, at pages 936, 937. In the last two cases this point was again held against the same corporation, which is the appellant in this case; the verdicts were for considerable sums, and in Norton's case the defendant was represented by the same counsel as in the present case."

But this is far from holding that in the case of a sale the corporate property shall remain liable for the debts of the old corporation in suits against it until a new domestic corporation is organized to take the place of the old one. The cases cited hold the lessor to a continued liability, notwithstanding a lease. In the case in hand the property and franchise have been sold, and there is no contractual relation between the companies nor permissive operation of the road by the new company.

Nor can we see any room for the application of sec. 1255 of the North Carolina Code, making liens for judgments for torts superior to mortgages of incorporated companies. In this case the tort was committed after the judgment debtor had parted with all its property and there was nothing for such judgment to operate upon. (*Jeffrey* v. *Moran*, 101 U. S. 286.)

Objection is made to the right of the corporation to maintain this bill. To determine this question reference must be had to the attitude of the parties and the nature of the remedy sought. By the decree of the Circuit Court all the property of the Western North Carolina Railroad Company was ordered to be sold, and was conveyed and confirmed to the purchaser, the Southern Railway Company; it was placed in possession of the property and has operated it ever since. The judgments in controversy were obtained for acts committed more than two years after the confirmation of the sale and were rendered about four years after the court adjudicated a sale of all the property of the Western North Carolina Railroad Company. To these actions the Southern Railway Company was not a party, yet it is sought to levy upon and sell the very property conveyed to it by the decree of the Federal court, and this upon the theory set up in the answer herein that the property is still liable for the debts of the Western North Carolina Railroad Company because of the failure to organize a domestic corporation to take its place after the sale. The return of the sheriff shows that he has levied upon all this

property, said to be of the value of five millions of dollars, to pay these judgments of twenty thousand dollars.

It is not claimed that the Western North Carolina Railroad Company acquired the property by any new title, but in effect it is sought to annul the order and decree of the Federal court because it has not operated to transfer the title to the purchaser. Examining the decree under which this property was sold, we find certain provisions which are important in this connection. It is provided:

"The purchaser or purchasers at said sale shall, as part of the consideration for such sale, take the property purchased upon the express condition that he or they, or his or their assigns approved by the court, will pay off and satisfy any and all claims filed in this cause, but only when the court shall allow such claims and adjudge the same to be prior in lien to the mortgage foreclosed in this suit, and in accordance with the order or orders of the court allowing such claims and adjudging with respect thereto, and the purchaser or purchasers, or their approved assigns, shall be entitled to appeal from any and all orders or decrees of the court in respect to such claims or any of them, and shall have all the right in respect to such appeals which the complainant Central Trust Company of New York would have in case such appeals had been taken by it. The purchaser or purchasers at said sale shall also, as part of the consideration, in addition to the payment of the sum or sums bid, take the property purchased upon the express condition that he or they, or his or their assigns approved by the court, will pay off and satisfy all debts or obligations incurred or to be incurred by the receivers having possession of such property which have not been or shall not be paid by said receivers and which shall be adjudged by the court to be debts or obligations properly chargeable against the property purchased, and to be prior or superior to the lien of the mortgage foreclosed in this suit.

"The court reserves the right to retake and resell said property in case of the failure or neglect of purchaser or purchasers, or his or their assigns approved by the court as aforesaid, to comply with any order of the court in respect to payment of prior lien claims above mentioned within twenty days after service of a copy of such order upon said purchaser or purchasers, or his or their assigns."

And in the decree affirming the sale we find:

"Thereupon the court orders and decrees that the said report of the special master be spread at large upon the record and be in all things approved, and the sale made by him to the said Southern Railway Company, being all and singular the railroad, equipment, property and franchises of the Western North Carolina Railroad Company as described in and by the decree of foreclosure entered in this cause on May 5, 1894, at and for the sum of five hundred thousand dollars ($500,000) by it bid, be and the same is in all things ratified, approved, confirmed and made absolute, subject, however, to all the mortgages, receivers' debts and preferential claims, and to all equities reserved, and to all and singular the conditions of purchase as recited in said decree, and the continued right of the court to adjudge and declare what receivers' or corporate debts are prior in lien or in equity to the lien of the mortgage herein foreclosed or

ought to be paid out of such proceeds of sale in preference to the bonds secured thereby. And this court expressly reserves for future adjudication, and power thereby to bind the property sold, all liens and claims and equities specified in and reserved by the said final decree of foreclosure so as aforesaid entered on May 5, 1894.

"And the court accepts the said Southern Railway Company as the purchaser of all and singular the railroad, property and franchises sold under the decree in this cause and holds it obligated as such purchaser to complete and fully pay its said bid and to comply with all the orders of the court heretofore entered, or hereafter from time to time to be entered by it obligatory on such purchaser. And the court reserves full power, notwithstanding such conveyance and delivery of possession, to retake and resell the property this day confirmed to such purchaser, if it fails or neglects fully to complete such purchase and comply with the orders of court in respect to the full payment and performance of its bid, or to pay into court in accordance with such decree of sale all such sums of money hereafter ordered by the court to be paid into its registry to discharge any and all such debts, liens or claims as it may decree ought to be paid out of the proceeds of sale in preference to the mortgage of the Western North Carolina Railroad Company herein foreclosed."

It is obvious that by this decree of sale and confirmation it was the intention and purpose of the Federal court to retain jurisdiction over the cause so far as was necessary to determine all liens and demands to be paid by the purchaser. It accepted the purchaser and thereby made it a party to the suit. (*Blossom* v. *Railroad Co.*, 1 Wall. 635.) The court reserved the right to retake the property if necessary to enforce any lien that might be adjudged against the same. On the other hand, the purchaser agreed to pay only such demands as the Circuit Court might declare and adjudge to be legally due, with the right of appeal from such judgment. These provisions make apparent the purpose of the court to retain jurisdiction for the purpose of itself settling and determining all liens and demands which the purchaser should pay as a condition of security in the title which the court had decreed to be conveyed. If the sheriff is allowed to sell the very property conveyed by the Federal decree, such action has the effect to annul and set it aside, because in the view of the State court it was ineffectual to pass the title to the purchaser. In such case we are of opinion that a supplemental bill may be filed in the original suit with a view to protecting the prior jurisdiction of the Federal court and to render effectual its decree. (*Central Trust Co. of New York* v. *St. L., A. & T. R. R. Co.*, 59 Fed. Rep. 385; *Fidelity Ins. Trust & Safe Deposit Co.* v. *N. & W. R. R. Co.*, 88 Fed Rep. 815; *State Trust Co.* v. *Kansas City, P. & G. R. R. Co.* 110 Fed. Rep. 10.)

In such cases where the Federal court acts in aid of its own jurisdiction and to render its decree effectual, it may, notwithstanding sec. 720, Rev. Stat., restrain all proceedings in a State court which would have the effect of defeating or impairing its jurisdiction. (*Sharon* v. *Terry*, 36 Fed.

Rep. 337, per Mr. Justice Field; *French* v. *Hay*, 22 Wall. 250; *Deitzsch* v. *Huidekoper*, 103 U. S. 494.)

Nor is it an answer to say that these judgments were for causes of action arising subsequent to the confirmation of sale. The Federal court by its decree, reserved the right to determine what liens or claims should be charged upon the title conveyed by the court, and by the levy and sale to pay these judgments the title is charged with other liens established in another court in a proceeding to which the purchaser was not a party. The Federal court, in protecting the purchaser under such circumstances, was acting in pursuance of the jurisdiction acquired when the foreclosure proceedings were begun.

In *Farmers' Loan & Trust Co.*, (original,) 129 U. S. 206–213, Mr. Justice Miller said: "But the doctrine that after a decree which disposes of a principal subject of litigation and settles the rights of the parties in regard to that matter there may subsequently arise important matters requiring the judicial action of the court in relation to the same property and some of the same rights litigated in the main suit, making necessary substantive and important orders and decrees in which the most material rights of the parties may be passed upon by the court, and which, when they partake of the nature of final decisions of those rights may be appealed from, is well established by the decisions of this court."

We think this case belongs to the class instanced by the learned justice, and that the Circuit Court by the order made retained jurisdiction of the case to settle all claims against the property and to determine what burdens should be borne by the purchaser as a condition of holding the title conveyed. In such cases the jurisdiction of the court may be invoked by supplemental bill or bill in the nature of a supplemental bill, irrespective of the citizenship of the parties. (*Freeman* v. *Howe et al.*, 24 How. 450–460.) The authorities are collected in a note to sec. 97, vol. 1, of Bates on Federal Equity Procedure, and the doctrine thus summarized: "It would seem that the prevention of the conflict of authority between the State and Federal courts, and the protection and preservation of the jurisdiction of each, free from encroachments by the other, are considerations which lie at the very foundation of ancillary jurisdiction. A bill filed to continue a former litigation in the same court, or which relates to some matter already partly litigated in the same court, or which is an addition to a former litigation in the same court, by the same parties or their representatives standing in the same interest, or to obtain and secure the fruits, benefits and advantages of the proceedings and judgment in a former suit in the same court by the same or additional parties, standing in the same interest, or to prevent a party from using the proceedings and judgment of the same court for fraudulent purposes, or to restrain a party

from using a judgment to perpetrate an injustice, or obtain an inequitable advantage over other parties to the former judgment or proceeding, or to obtain any equitable relief in regard to, or connected with, or growing out of, any judgment or proceeding at law rendered in the same court, or to assert any claim, right or title to property in the custody of the court, or for the defense of any property rights, or the collection of assets of any estate being administered by the court, is an ancillary suit."

While recognizing the weight which should be given to decisions of the Supreme Court of a State in construing its own laws, and being disposed to follow them and accept the conclusions reached in construing local statutes in every case of doubt, we are here dealing with a right and title conferred by authority of the decree of a Federal court, which may be virtually set aside and held for naught if the property awarded can be taken upon execution in suits to which the purchaser is not a party. It is conceded that the Federal right could be set up in the State court from which the execution issued, and, if denied, the ultimate rights of the parties can be determined upon writ of error to this court. In the view we have taken of this case the Federal court had not lost its jurisdiction to protect the purchaser at its sale upon direct proceedings such as are now before us.

We find no error in the judgment of the Circuit Court of Appeals, and the same is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.